

***United States Court of Appeals
for the Second Circuit***



APPENDIX

*Original with Affidavit of
Mailing*

76-1251
76-1252

*B
175*

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 76-1251, 76-1252

UNITED STATES OF AMERICA,

Appellant,

—against—

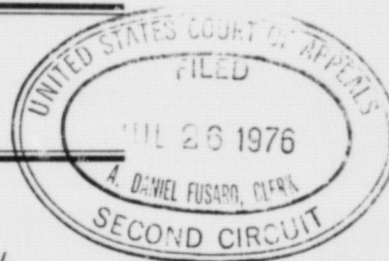
JOHN MAURO and JOHN FUSCO,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

GOVERNMENT'S APPENDIX

DAVID G. TRAGER,
*United States Attorney,
Eastern District of New York.*



PAGINATION AS IN ORIGINAL COPY

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U.S. vs. JOHN MAURO
 75 CR 816
 0711
 207 1
 District Office
 U.S. CODE SECTION 18-401
 HARGES
 Did disobey the lawful order of the U.S. in that he refused to answer questions before the Grand Jury, etc.
 U.S. Attorney or Asst. Marsha Katz
 Defense: L. CJA, L. Ret, L. Waived, L. S.
 COUNTS 1
 MAGR CASE NO. 75-817-818-819
 BAIL • RELEASE
☐ Personal Recog. ☐ Unsecured Bond
☐ Conditional Release
 Set (000) \$
☐ 10% Depos ☐ Surety Bond
☐ Collateral
☐ 3rd Party Custody
☐ PSA
 (See Docket)
 CLOSED

ARREST
 U.S. Custody or Began on Above Charges
 High Risk Defn. & Date Design'd
 INDICTMENT
 Information ☐ 11/3/75
 Waived ☐
 Superseding ☐ Indict/Info ☐
 Prosecution Deferred
 ARRAIGNMENT
 Trial Set For 4-26-76
 1st Plea 11-24-75
 Final Plea
 Not Guilty ☐ Nolo ☐ Guilty ☐
 TRIAL
 Voir Dire ☐
 Trial Began ☐ N
 Trial Ended
 Disposed of 4/26/76
 Convicted ☐ On All Counts ☐
 Acquitted ☐ On Lesser Offense ☐
 Dismissed ☒ WOP ☐ V.P.
 Noted/Discontinued

Search Warrant	Issued	DATE	INITIAL/No.	INITIAL APPEARANCE	INITIAL/No.	OUTCOME
Summons	Issued			PRELIMINARY EXAMINATION OR REMOVAL HEARING		Dismissed <input type="checkbox"/> Exonerated <input type="checkbox"/> Held for District GJ <input type="checkbox"/> To Transfer District <input type="checkbox"/> Held to Answer to U. S. District Court <input type="checkbox"/>
Arrest Warrant	Served			Waived <input type="checkbox"/> Intervening <input type="checkbox"/> Not Waived <input type="checkbox"/> Indictment <input type="checkbox"/>		AT
COMPLAINT				Tape No.	INITIAL/No.	Magistrate's Initials
OFFENSE (In Complaint)						

Show last names and suffix numbers of other defendants on same indictment/information

DATE	PROCEEDINGS	V. Excludable Delay
		(a) (b) (c) (d)
11-3-75	Before COSTANTINO J - Indictment filed.	
11-5-75	Petition for Writ of Habeas Corpus Ad Prosequendum filed.	
11-5-75	Writ Issued	
11/13/75	Before BARTELS, J.- Case called: deft present without counsel case respectfully referred to Judge Costantino	
11-24-75	Before BARTELS J - case called - deft present without counsel - court interposes a plea of not guilty - status report set down for Dec. 2, 1975 at 9:30 am	
12-2-75	Before BARTELS J - case called - deft & atty S. Murphy present - trial set down for 3-17-76 - certificate of engagement issued.	
12/16/75	Writ retd and filed- executed	
3/2/76	Petition for writ of habeas corpus ad prosequendum filed- issued	
3-17-76	Before BARTELS, J - case called - defts motion set down for 4-16-76 - trial set down for 4-26-76 at 10:00am.	
3/19/76	Notice of motion to dismiss filed ret. 4/16/76	
4-14-76	Govts reply filed to defts motion to dismiss the indictment	
4-14-76	Govts notice of readiness for trial filed	

OPPOSITE THE APPLICABLE DOCKET ENTRIES IN SECTION IV SHOW, IN SECTION V, ANY OCCURRENCE OF EXCLUDABLE DELAY PER 18 USC §3161(h) - "SPEEDY TRIAL ACT".

DATE	IV. PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
4/14/76	Petition for writ of habeas corpus ad prosequendum filed - issued				
4-23-76	Writ ret'd and filed - executed (Mauro)				
4/26/76	Before BARTELS, J. - Case called - deft and counsel present - deft's motion to dismiss on ground of violation of interstate agreement on retainers argued - granted - indictment ordered dismissed - memorandum and order to follow. S.A. Katz dated 5/5/76 filed				
5/5/76	3 transcripts filed one dated Nov. 24, 1975, one dated Nov. 13, 1975 and one dated Dec. 21, 1975				
5-6-76	Supplemental Brief filed in opposition to deft's motion to dismiss indictment under Part IV(e) of the Interstate Agreement on Detainers				
5/17/76	By BARTELS, J. - Memorandum and Order filed dismissing indictment				
5-24-76	Notice of appeal filed by Govt.				
5-24-76	Docket entries and duplicate of Notice mailed to the Court of appeals.				
5-26-76	Stenographers transcript filed dated Mar. 17, 1976				
6/1/76	Record on appeal certified and mailed to court of appeals				
6-3-76	Order filed received from the court of appeals that the Record on appeal be docketed on or before 6-25-76.				
6-7-76	Acknowledgment received from the Court of appeals filed for receipt of record on appeal.				

JURY CRIMINAL DOCKET		U. S. vs. JOHN FUSCO		Case Filed 8-11-75	Docket No. 75-819
Assigned Trial DATE 0711	U.S. vs.	75 CR 819	Defendant	No. of 1 Defendants	BARTELS
Office	Disp./Sentence	COUNTS		MAGR. CASE NO.	
CODE SECTION 28-401	OFFENSES Did refuse to answer questions before the Grand Jury	CLOSED		BAIL • RELEASE <input type="checkbox"/> Personal Recog <input type="checkbox"/> Denied <input type="checkbox"/> Unsecured Bond AMT Conditional Release Set (000) <input type="checkbox"/> 10% Deposit \$ <input type="checkbox"/> Surety Bond <input type="checkbox"/> Collateral <input type="checkbox"/> Bail Not Made <input type="checkbox"/> Bail Status Changed (See Docket) <input type="checkbox"/> 3rd Party Custody <input type="checkbox"/> PSA	
U.S. Attorney or Asst. Marsha Katz		Defense: X J.A. Ret. L. Waived, L. Self, L. None L. Other, L. PD, L. CD John Corbett 68 Court Street Brooklyn, N.Y. 875-1975			
ARREST <input type="checkbox"/> U.S. Custody Began Above Charge <input type="checkbox"/> High Risk Defn. & Date Design'd <input type="checkbox"/> Prosecution Deferred		INDICTMENT Information <input checked="" type="checkbox"/> 11/3/75 Waived <input type="checkbox"/> Superseding <input type="checkbox"/> Indict/Info <input type="checkbox"/>		ARRAIGNMENT 11-24-75 Trial Set For 2/4/76 1st Plea II Final Plea <input checked="" type="checkbox"/> Not Guilty <input type="checkbox"/> Nolo <input type="checkbox"/> Guilty <input type="checkbox"/> Not Guilty <input type="checkbox"/> Nolo <input type="checkbox"/> Guilty	
		TRIAL Vojr. Dire <input type="checkbox"/> Trial Began <input type="checkbox"/> J Trial Ended <input type="checkbox"/> N <input checked="" type="checkbox"/> Dismissed <input type="checkbox"/> Nolo/Discontinued*		SENTENCE Disposition 5/19/76 <input type="checkbox"/> Convicted <input type="checkbox"/> On All Chgs <input type="checkbox"/> Acquitted <input type="checkbox"/> On Lesser Offenses <input type="checkbox"/> WOP, <input type="checkbox"/> V.P. <input type="checkbox"/> Nolo/Discontinued*	

Search Warrant	Issued	DATE	INITIAL/No.	INITIAL APPEARANCE	INITIAL/No.	OUTCOME
	Return			PRELIMINARY EXAMINATION OR REMOVAL HEARING		<input type="checkbox"/> Dismissed <input type="checkbox"/> Held for District CJ <input type="checkbox"/> Held to Answer to U. S. District Court <input type="checkbox"/> Exonerated <input type="checkbox"/> To Transfer District
Summons	Issued			<input type="checkbox"/> Waived <input type="checkbox"/> Not Waived <input type="checkbox"/> Intervening Indictment		
Arrest Warrant	Served					
COMPLAINT				Tape No	INITIAL/No.	Magistrate's Initials
OFFENSE (plaint)						

DATE		PROCEEDINGS	V. Excludable Delay	
(a)	(b)		(a)	(b)
11-3-75		Before COSTANTINO J - Indictment filed.		
11-5-75		Petition for Writ of Habeas Corpus Ad Prosequendum filed.		
11-5-75		Writ Issued		
11-13-75		Before BARTELS, J.- Case called- Pleading adjd to 11/17/75		
11-17-75		Before BARTELS, J.- Case called- deft and counsel present case respectfully referred to Judge Judd for pleading		
11-18-75		By BARTELS, J. - Order appointing counsel filed		
11-24-75		Before BARTELS J - case called - deft & counsel John Corbett present - deft waives reading of the indictment and enters a plea of not guilty - status report set down for Dec. 2, 1975 at 9:30 am.		
11-25-75		Writ ret'd and filed - Executed.		
12/2/75		Before BARTELS, J.- Case called- deft and counsel present trial set down for 2/4/76 at 10:00 A.M.-certificate of engagement issued		
2-4-76		Subpoena to Testify etc. received from Chambers and placed in criminal folder.		
3/2/76		Petition for writ of habeas corpus ad prosequendum filed- issued		
3-18-76		Before BARTELS, J - case called - trial adjd to 4-29-76.		
4-14-76		Govts Notice of readiness for trial filed		

OPPOSITE THE APPLICABLE DOCKET ENTRIES IN SECTION IV SHOW, IN SECTION V, ANY OCCURRENCE OF EXCLUDABLE DELAY PER 18 USC 3161(h)(1) - SPEEDY TRIAL ACT

DATE	IV. PROCEEDINGS (continued)	V. EXCLUD-ABLE DELAY			
		(a)	(b)	(c)	(d)
4-27-76	Notice of Motion filed for dismissal (forwarded to Chambers)				
4-29-76	Before BARTELS J - case called - deft & atty present - defts mot' to dismiss the indictment argued and granted - Memorandum Order to follow.				
5-5-76	Writ re filed - executed.				
5-6-76	three stenographers transcripts filed (placed in 75 CR-816) dated Nov. 13, Nov. 24 and Dec. 21, 1975 respectively.				
5-6-76	Supplemental Brief in opposition to defts motion to dismiss indictment under Part IV(e) of the Interstate Agreement on Detainers.				
5/10/76	Voucher for compensation of counsel filed				
5/13/76	Stenographers Transcript dated 4/29/76				
5-19-76	By BARTELS, J - Order filed dismissing the indictment.				
5-24-76	Govts Notice of appeal filed.				
5-24-76	Docket entries and duplicate of Notice mailed to the Court of appeals.				
5-26-76	Stenographers transcript filed dated Nov. 17, 1976				
6/1/76	Record on appeal certified and mailed to court of appeals				
6/4/76	Acknowledgment received from court of appeals for receipt of record				
6-7-76	Order filed that Index to Record on appeal be docketed on or before June 25, 1976.				

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

A

5

-----x
UNITED STATES OF AMERICA

INDICTMENT

-v-

18 USC §401

JOHN MAURO,

Defendant
-----x

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 12th. day of May, 1975 in the Eastern District of New York, JOHN MAURO, being then a witness before the Grand Jury of the United States District Court for the Eastern District of New York, having received a lawful order of a Court of the United States, in open court to wit: to proceed to the Grand Jury room to answer under a grant of immunity, the questions to be asked of him in the conduct of the Grand Jury proceeding, did unlawfully, wilfully and knowingly disobey the lawful order of the United States District Court for the Eastern District of New York, in that he refused to answer the questions asked of him in the course of the Grand Jury proceedings.

(Title 18, United States Code, Section 401)

A TRUE BILL

FORELADY

DAVID G. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

A 6

-----X
UNITED STATES OF AMERICA

INDICTMENT

18 USC §401

-v-

JOHN FUSCO,

Defendant

-----X
THE GRAND JURY CHARGES:

COUNT ONE

On or about the 9th. day of June, 1975, in the Eastern District of New York, JOHN FUSCO, being then a witness before the Grand Jury of the United States District Court for the Eastern District of New York, having received a lawful order of a Court of the United States, in open court to wit: to proceed to the Grand Jury room to answer under a grant of immunity, the questions to be asked of him in the conduct of the Grand Jury proceeding, did unlawfully, wilfully and knowingly disobey the lawful order of the United States District Court for the Eastern District of New York, in that he refused to answer the questions asked of him in the course of the Grand Jury proceedings.

(Title 18, United States Code, Section 401)

A TRUE BILL

FORELADY

DAVID G. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA :

-against- :

JOHN MAURO, :

75-CR-816

Defendant. :

-----x

Appearances:

HON. DAVID G. TRAGER
United States Attorney
Eastern District of New York
Attorney for United States of America
DAVID MARGOLIS, ESQ.
Attorney in Charge
Brooklyn Strike Force
MARSHA KATZ, ESQ.
Special Attorney
Of Counsel

MURPHY, SADOWSKI & KOEHLER, ESQS.
Attorneys for Defendant
125-10 Queens Blvd.
Kew Gardens, New York 11415
STEPHEN G. MURPHY, ESQ.
Of Counsel

BARTELS, District Judge

In this proceeding the Court is confronted with
the difficult question of interpreting a federal statute in
a manner which, according to the express meaning, raises in

the mind of the Court grave doubts as to whether its objectives could have been accomplished in a more practical manner. The facts appear as follows.

On December 12, 1974, the defendant, John Mauro, was sentenced to a term of imprisonment for three years to life by the State of New York. On May 7, 1975, while in the custody of the State of New York, he was subpoenaed to testify before a federal grand jury sitting in the Eastern District of New York and was produced pursuant to a Writ of Habeas Corpus Ad Testificandum. The defendant received a grant of immunity signed on May 12, 1975, by Judge Costantino. Subsequently, when the defendant refused to answer questions before the grand jury, after having been ordered to do so by Judge Costantino, he was held in civil contempt and sentenced to a prison term of six months or the life of the grand jury, whichever was longer, upon the condition that he could purge himself by testifying at any time during the grand jury term. The defendant having continued his refusal to testify, the United States, on July 9, 1975, lodged a detainer against him at the Auburn Correctional Facility charging him with contempt of court, and thereafter on July 30, 1975, he was returned to the custody of the State of New York. On November 11, 1975,

the defendant was indicted in the Eastern District of New York for criminal contempt of court in violation of 18 U.S.C. §401.

Pursuant to a Writ of Habeas Corpus Ad Prosequendum, issued on November 5, 1975, the defendant was thereafter produced in the Eastern District on November 24, 1975, and on December 2, 1975, he was arraigned on the indictment and pled not guilty. On that date, to accommodate the defendant's counsel, the trial date was set for March 17, 1976, after the Court offered the dates of February 4, 1976, February 9, 1976, and March 3, 1976. On December 11, 1975, the defendant was again returned to state custody without having been tried on the charge of criminal contempt. Subsequently, on April 23, 1976, the defendant was again produced in Federal court pursuant to a Writ of Habeas Corpus Ad Prosequendum, issued on April 14, 1976, for the purpose of trial.

In 1970 Congress adopted, on behalf of the United States and the District of Columbia, the Interstate Agreement on Detainers, 18 U.S.C. Appendix ("Agreement"), which, along with similar enactments in thirty-nine states, provides a uniform procedure whereby each of the participating jurisdictions can readily obtain the presence of criminal de-

fendants incarcerated in other participating jurisdictions. It is the interpretation of Article IV of the Agreement with which this Court is now concerned. However, to understand that Article, reference must be made to Article III which provides that when one jurisdiction files a detainer on a defendant incarcerated in another jurisdiction the existence of that detainer must be made known to the defendant who then has the option of demanding in writing a trial on the charges in the other jurisdiction forming the basis of the detainer. If the defendant makes such a demand to the proper authorities he must be transferred to the jurisdiction filing the detainer and must thereafter be tried within 180 days of the formal written demand or the indictment must be dismissed. Article IV provides that the jurisdiction filing the detainer may at its option request the custody of the defendant for the purpose of trial even if the defendant has not made a written demand for trial pursuant to Article III. In such event, however, a trial on the charges forming the basis of the detainer must, under Article IV(c), be commenced within 120 days of the defendant's arrival in the receiving jurisdiction. Article IV(e) further provides:

"If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e), hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice."

The defendant now moves for an order dismissing the indictment pursuant to Article IV(e) of the Agreement on the ground that the Government failed to try him on the federal charges before returning him to state custody in violation of that Article, and on the further ground that at the time he was held in civil contempt he was not advised of the Government's contemplated indictment for criminal contempt.

As set forth in Article I of the Agreement, the policy and purposes of the Agreement are to insure the speedy trial of a defendant subject to charges in another jurisdiction by way of a detainer, to eliminate the adverse effects upon programs of prisoner² treatment and rehabilitation caused by uncertainty surrounding those charges, and to create cooperative procedures to secure the presence of defendants incarcerated in other jurisdictions. See also 3 U.S. Code Cong. & Adm. News 4864 (1970). More specifically,

the Agreement was executed to eliminate the problem which arose when one jurisdiction tried, convicted and incarcerated a defendant and thereafter another jurisdiction lodged a detainer against the individual and simply waited to try the defendant after his release from the custody of the first jurisdiction. Often this procedure caused the delay of a trial for many years and, in addition, provided a Damoclean Sword over the defendant which would not only have an adverse psychological impact upon the defendant but would also impede the efforts of the incarcerating jurisdiction to rehabilitate the defendant since, among other things, it would render the defendant ineligible for probation or parole. United States ex rel. Esola v. Groomes, 520 F.2d 830, 836-7 (3d Cir. 1975); United States v. Cappucci, 342 F.Supp. 790 (E.D.Pa. 1972); 116 Cong. Rec. 14000 (1970). As indicated above, the predicate for the defendant's motion is the fact that he was produced in this Court on November 24, 1975 pursuant to a writ and was returned to state custody on December 11, 1975 without being tried.

I

In opposition the Government argues that when Congress adopted the Agreement on behalf of the United States it did so only as a sending state and not as a receiving state. Therefore it is argued that when the United States receives a state prisoner for the purpose of trial, it is not subject to the sanctions imposed by Article IV because it did not adopt the Agreement as a receiving state. In support of its position the Government asserts that the legislative history demonstrates that when Congress adopted the Agreement it was solely concerned with making a procedure available to the states for securing the presence of federal prisoners so that the states could satisfy the speedy trial requirements of the Constitution as mandated by the Supreme Court in Smith v. Hooey, 393 U.S. 374 (1969), and Dickey v. Florida, 398 U.S. 30 (1970). Because a federal Writ of Habeas Corpus Ad Prosequendum issued pursuant to 28 U.S.C. §2241 is valid legal process throughout the United States binding against the states for the purpose of obtaining custody of state prisoners for a federal trial, Carbo v. United States, 364 U.S. 611 (1961), the Government asserts that it was unneces-

sary for the United States to adopt the Agreement as a receiving state. Furthermore, it claims that Congress never intended to restrict the effect of 28 U.S.C. §2241 or to alter the delicate federal-state relationship under the Supremacy Clause of the Constitution, Article VI. We cannot agree.

Nowhere in the text of the Agreement or in the prefatory enabling portions of its enactment is there any specific indication that the United States was becoming a limited participant as a sending state. In fact, the text itself suggests that the United States entered into the Agreement on the same terms as all other participating states. Article II(a) defines the term "State" to mean:

"a State of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico."
[Emphasis added.]

See United States v. Cappucci, supra. Article II(c) defines a "receiving state" as a "State in which trial is to be had on an indictment, information, or complaint pursuant to article III or article IV hereof." [Emphasis added.]

Certainly under the express wording of the Agreement itself the United States is a receiving state and there is nothing

in the Agreement excluding the United States from that status. In fact, for the purposes of an Article III request by a state prisoner for trial on federal charges the United States has been treated as a receiving state subject to the sanctions imposed by that Article. See United States v. Masc..., 372 F.Supp. 651 (N.D. Ohio 1973).

Nor does the legislative history, which is sparse at best, alter this result. While it appears from the Senate Report that Congress was obviously responding to the need of the states for a procedure to secure the presence of federal prisoners in order to provide a speedy trial on their state charges and to escape the effect of the rulings in Smith v. Hooey, supra, and Dickey v. Florida, supra, the report also indicates that "the agreement shall enter into full force and effect as to a party 'State' when such State has enacted the same into law." [Emphasis added.] 3 U.S. Code Cong. & Adm. News 4864, 4866 (1970). Nowhere in the legislative history does Congress indicate that the United States is under any lesser obligation as a "State" than other states adopting the Agreement or that the Agreement has less than full force and effect against the United States

as a "State" as that term is defined in the Agreement. In fact, in a letter from Graham W. Watt, Assistant Commissioner of the District of Columbia, dated March 2, 1970, to Congressman Emanuel Celler, Chairman of the Committee on the Judiciary, which is included in the legislative history, it was stated that:

"H.R. 6951, if passed, will also enable the Attorney General or his representative to have a prisoner against whom he has lodged a detainer for violation of an offense against the United States and who is serving a term of imprisonment in any party State made available for disposition of such detainer."

3 U.S. Code Cong. & Adm. News 4869 (1970). This statement demonstrates that it was anticipated that the United States would be participating in the Agreement as a receiving state as well as a sending state.^{1/} Moreover, the statute enacted was the "Interstate Agreement on Detainers" which was also enacted by thirty-nine other states. It is difficult to understand how the Federal Government could possibly become a party to such "Agreement" on its own terms without the consent of the other states which were already bound to each other on different terms. It is true that the Government could enact a special statute limiting its obligation to

that of a sending state but that is quite different from becoming a party to an agreement the terms of which have already been fixed by the other states.

The Government additionally contends that the congressional purpose of limiting the participation of the United States in the Agreement to a sending state is enunciated in §3201(a) of the Criminal Justice Reform Act of 1975 (commonly referred to as "S-1") which was introduced in the Senate on January 15, 1975 and is still pending.

That section provides:

"(a) Adoption of Agreement by the United States—The United States, solely as a 'sending state,' and the District of Columbia are parties to the Interstate Agreement on Detainers"

In a report of the Committee on the Judiciary, United States Senate, on the provisions of S-1 the Committee in referring to §3201(a) stated that the existing enabling act of the Agreement

"has been amended to clarify the intent of Congress by providing that the Federal Government is a participant in the Agreement only in the capacity of a 'sending state.' Federal prosecution authorities and all Federal defendants have always had and continue to have recourse to a speedy trial in a Federal court pursuant to 28 U.S.C. 2241(c)(5),

the Federal writ of habeas corpus ad prosequendum. The Committee does not intend, nor does it believe that the Congress in enacting the Agreement in 1970 intended, to limit the scope and applicability of that writ."

We find that for the purpose of determining the intent of the Ninety-First Congress in enacting the Agreement, both the provisions of S-1 and the Committee comments thereon are today irrelevant for the following reasons: (1) S-1 has not yet been enacted by Congress and may never be, (2) there is no assurance that the Congress as a whole will accept §3201(a) as part of S-1 when and if it finally is enacted, and (3) no subsequent Congress is in a position to express the intent of a previous Congress in enacting legislation.

Finally, we cannot lose sight of the fact that one of the express congressional purposes in adopting the Agreement was to ameliorate the adverse and disruptive effects upon rehabilitation programs caused by detainers and uncertainty over their ultimate disposition. Such effects are equally present when federal authorities receive state prisoners as when state authorities receive federal prisoners. Article IX of the Agreement provides that the Agreement be liberally construed so as to effectuate its purposes and

such a construction would prohibit a differentiation between disruption of state and federal rehabilitation programs.

We conclude, therefore, that the United States is participating in the Agreement as both a sending and a receiving state. In so concluding we are cognizant of the principle of statutory interpretation at times invoked by Judge Learned Hand where he observed under different circumstances that:

"There is no surer guide in the interpretation of a statute than its purpose when that is sufficiently disclosed; nor any surer mark of over solicitude for the letter than to wince at carrying out that purpose because the words used do not formally quite match with it."

Federal Deposit Insurance Corp. v. Tremaine, 133 F.2d 827, 830 (2d Cir. 1943). See Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960). But here it is apparent that Congress failed to foresee or consider, one way or the other, the particular problem presently before the Court and failed to express in the statute or its legislative history any intent to limit the participation of the United States. It is possible that if brought to its attention Congress would have adopted the Agreement solely as a sending state subject to the consent of the

other states, but this is only speculation and we cannot undo what it has done. If the statute requires amending, Congress knows how to do it, as for example in S-1, but there is no basis for this Court to legislate under the guise of construction by limiting the participation of the United States to that of a sending state. Dorszynski v. United States, 418 U.S. 424,442 (1974).

II

In the alternative the Government argues that no detainer for the criminal contempt indictment was ever lodged against the defendant and that he was produced on November 24, 1975 only pursuant to a Writ of Habeas Corpus Ad Prosequendum issued under 28 U.S.C. §2241(c)(5) and not pursuant to the terms of the Agreement. The Government contends that having failed to invoke the provisions of the Agreement Article IV(e) is inapplicable and, accordingly, there is no basis for dismissing the indictment. We agree, however, with the reasoning of the Third Circuit in United States ex rel. Esola v. Groomes, supra, at 836-37, that whenever the Agreement is available for securing the presence of a defendant for the purpose of prosecution it is the exclusive

means for doing so and the Government is charged with having invoked its provisions by use of the writ. See United States v. Ricketson, 498 F.2d 367,373 (7th Cir. 1974). Any other result would provide an easy means for circumvention of the terms of the Agreement and render them meaningless.

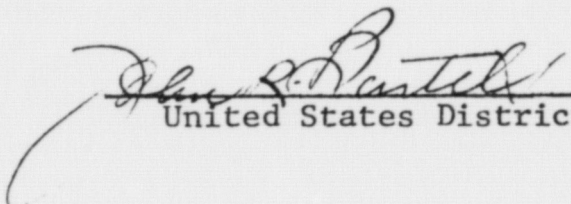
Once the Government has obtained the custody of a defendant under the Agreement, it is subjected to two restraints: (1) the defendant must be tried within 120 days after arrival in federal custody, Article IV(c), and (2) the defendant must be tried before being returned to the custody of the state, Article IV(e). United States ex rel. Esola v. Groomes, supra; United States v. Ricketson, supra. Here the defendant was returned to state custody before being tried under the apparent misapprehension that he could be returned for trial at any time after arraignment subject to compliance with the speedy trial requirements of the Court. The Government was simply in error in not remembering the terms of the Agreement.^{2/}

The Government having returned the defendant to state custody in violation of Article IV(e), the defendant's motion to dismiss the indictment must be and hereby is

granted.

SO ORDERED.

Dated: Brooklyn, N.Y.,
May 17, 1976.


United States District Judge

FOOTNOTES

- 1/ In referring to the possibilities applicable to the District of Columbia this letter made a distinction between the District prosecuting authorities and the Attorney General by asserting that the Agreement would also enable (1) District prisoners to require state authorities to try them on state charges, (2) state prisoners to demand a trial on charges arising out of the laws of the District, and (3) "District prosecuting authorities to have a prisoner in a party State made available for disposition of local detainees." 3 U.S. Code Cong. & Adm. News 4869-4870 (1970).
- 2/ It should be noted that by being compelled to retain a defendant in federal custody after arraignment the Government would be charged with the custodial expenses until it returned the defendant to the state which could exceed four months. See Article V(h) of the Agreement. A more practical solution would be an amendment to the Agreement permitting production of the defendant in the receiving state for arraignment, requiring return to state custody within 10 days and thereafter applying the requirements of Article IV(e).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA :

-against- :

JOHN FUSCO, : 75-CR-819

Defendant. :

-----x

Appearances:

HON. DAVID G. TRAGER
United States Attorney
Eastern District of New York
Attorney for United States of America
DAVID MARGOLIS, ESQ.
Attorney in Charge
Brooklyn Strike Force
MARSHA KATZ, ESQ.
Special Attorney
Of Counsel

JOHN C. CORBETT, ESQ.
Attorney for Defendant
66 Court Street
Brooklyn, New York 11201

BARTELS, District Judge

In November, 1975, the defendant, John Fusco,
was in the custody of the State of New York at Clinton
Correctional Facility serving a three year to life sentence.
On or about November 24, 1975, he was produced in the

Eastern District of New York pursuant to a Writ of Habeas Corpus Ad Prosequendum, issued on November 5, 1975, for the purpose of trial on a federal indictment charging him with criminal contempt of court in violation of 18 U.S.C. §401. On December 2, 1975, he was arraigned on the indictment and entered a plea of not guilty and thereafter, on December 18, 1975, he was returned to state custody. On or about April 28, 1976, the defendant was again produced in this District, pursuant to a Writ of Habeas Corpus Ad Prosequendum issued on March 1, 1976, for the purpose of trial.

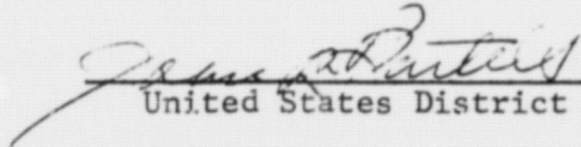
The defendant now moves for an order pursuant to Article IV(e) of the Interstate Agreement on Detainers, 18 U.S.C. Appendix ("Agreement"), dismissing the indictment on the ground that the Government violated that Article by returning him to state custody on December 18, 1975 without a trial on his federal charges. On the basis of this Court's decision and order, dated May 17, 1976, in the case of United States v. John Mauro, Docket No. 75-CR-816 (E.D. N.Y.), we find that the Government violated Article IV(e) of the Agreement by returning the defendant to state custody on December 18, 1975 without a trial and accordingly the indictment must be and hereby is dismissed.

A 26

3.

SO ORDERED.

Dated: Brooklyn, N.Y.,
May 19, 1976.


United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA :

against :

JOHN MAURO, :

75 CR 816

Defendant :

-----X

United States Courthouse
Brooklyn, New York

November 13, 1975
9:30 a.m.

B e f o r e:

HONORABLE JOHN R. BARTELS,

U. S. D. J.

SHELDON SILVERMAN
Court Reporter

Appearances:

DAVID G. TRAGER, Esq.
United States Attorney for the
Eastern District of New York

By: MARSHA KATZ, Esq.
Assistant U. S. Attorney

STEPHEN MURPHY, Esq.
Attorney for defendant
(Not Present)

1 THE CLERK: Criminal cause for pleading,
2 United States of America versus John Mauro.

3 MS. KATZ: Your Honor, I believe this is a
4 similar kind of thing, and your Honor, your previous
5 ruling, we would also want it--

6 THE COURT: Judge Costantino.

7 MS. KATZ: Yes.

8 THE COURT: Back to Judge Costantino.
9 It must be a hard case if all these witnesses refuse
10 to testify. Is he incarcerated?

11 MS. KATZ: All under state sentences.

12 THE COURT: This goes back to Judge
13 Costantino.

14 Have you got a lawyer?

15 THE DEFENDANT: No.

16 THE COURT: Have you got a lawyer?

17 THE DEFENDANT: Not as of yet.

18 THE COURT: Are you going to get one?

19 THE DEFENDANT: I spoke to my wife last night.

20 THE COURT: Let us know. He's in the same
21 category as the other man, Mr. Smith?

22 MS. KATZ: Yes.

23 I'll notify the Marshals, who will notify
24 him.

25 THE COURT: Ask the Clerk downstairs why did

1 they put it in the drum.

2 MS. KATZ: I don't know, your Honor.

3 THE COURT: You can see it's a related case.
4 He's been there not only on a related case, but the
5 same case. It isn't as though this was a contempt
6 which took place in his own courtroom personally.
7 In that case, then--

8 MS. KATZ: Grand jury witness.

9 THE COURT: There's no possible justification
10 for him not continuing. Take it back.
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA, :

75-CR-819

-against- :

JOHN FUSCO, :

Defendant. :

-----X

United States Courthouse
Brooklyn, New York

November 17, 197⁵
9:30 o'clock A.M.

B e f o r e :

HONORABLE JOHN R. BARTELS, U.S.D.J.

BURTON SULZER
OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: ALAN SHLEPPIN, ESQ.
-and-
MARSHA KATZ, ESQ.
Assistant U.S. Attorneys

JOHN FUSCO
Pro Se

Also present:

EDWARD C. MONTELL

BS/rp

1 MR. MONTELL: May I respectfully apprise
2 the Court that I have not been retained in this
3 matter.

4 Professional courtesy dictated that I re-
5 ceive a notice. I appear here this morning. I
6 have represented him in the State Court, but
7 I have not been retained in this matter.

8 THE COURT: Are you going to retain this
9 gentleman as your attorney?

10 MR. MONTELL: I don't believe he has
11 the funds with which to retain me.

12 THE COURT: I am talking to you.

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Can you retain this gentleman?

15 THE DEFENDANT, No, I can't, your Honor.
16 I mean, I've had him --

17 THE COURT: What do you mean you represent
18 him in the State Court. Was he before the State
19 Court?

20 MR. MONTELL: Yes.

21 THE COURT: In a criminal matter?

22 MR. MONTELL: In a criminal matter, sir,
23 yes, he's presently incarcerated, sir, and the
24 matter before your Honor emanated from a Grand Jury
25 proceeding.

1 THE COURT: He wouldn't answer; is that
2 right?

3 I understand that he refuses to answer
4 the questions; is that right?

5 Someone tell me, I'm asking a simple question.

6 MR. MONTELL: May I respectfully again ap-
7 prize the Court that prior to our being notified
8 to appear before the Grand Jury, the U. S. attorney,
9 the assistant U. S. attorney, advised the defendant
10 the questions that she proposed to ask him before
11 the Grand Jury and the U. S. attorney had gone
12 way beyond that scope, and this is the reason
13 for Mr. Fusco having --

14 THE COURT: Where is the U. S. attorney?

15 MR. SHLEPPIN: Ms. Katz, your Honor, and
16 she is not here today.

17 MR. MONTELL: For that reason, sir, that
18 was the reason for his refusing to answer at that
19 time, sir, based on the knowledge that I have.

20 THE COURT: I just want to know the nature
21 of the crime, that's all.

22 What are we going to do about this? You
23 are not the lawyer, you don't know whether you are
24 in or out; is that right?

25 MR. MONTELL: I would plead the defendant
not guilty for that purpose alone, sir.

1 THE COURT: Plead the defendant not guilty.

2 You better get a lawyer because you are
3 going to be put down for trial.

4 You understand, Mr. Fusco?

5 THE DEFENDANT: No, your Honor, I don't.

6 THE COURT: Maybe I'm not making myself
7 clear.

8 THE DEFENDANT: I don't understand, be-
9 cause last time I was in front of a judge --

10 THE COURT: What judge?

11 THE DEFENDANT Judge Judd, and I was told
12 I was in civil contempt and I was given six months.

13 THE COURT: You are still under civil
14 contempt. You are still serving the six months.

15 THE DEFENDANT: As far as I know, I am,
16 your Honor.

17 THE COURT: When did you go in?

18 THE DEFENDANT: In May.

19 THE COURT: The six months ended -- is about
20 to expire.

21 THE DEFENDANT: To my knowledge, it hasn't
22 expired yet.

23 THE COURT: How is it I get this case?

24 THE CLERK: I believe it should be Judge
25 Judd's case.

1 THE COURT: I don't know the facts. The
2 same is true of Marino.

3 I'm very sorry, gentlemen.

4 THE DEFENDANT: Your Honor --

5 (Ms. Katz is present for the U. S. attorney.)

6 THE DEFENDANT: I asked to meet with my co-
7 defendant to find out what was going on because
8 to my knowledge I was already brought in front
9 of Judge Judd --

10 THE COURT: Why is this case here, Ms. Katz?

11 MS. KATZ: I have written a letter to
12 Judge Mishler asking that the case be transferred
13 to various judges.

14 There are two judges involved, Judge Costantino
15 and Judge Judd.

16 THE COURT: Why can't they handle it?

17 MS. KATZ: The procedure is that I had to
18 make a request to Judge Mishler and I have not
19 gotten a response yet.

20 THE COURT: Who told you -- to be assigned
21 to other judges?

22 MS. KATZ: Yes.

23 THE COURT: Why should it be assigned to
24 other judges, who told you it had to be assigned
25 to other judges?

1 MS. KATZ: Your Honor, I appeared before
2 you last week and at that time it was -- there
3 are four individuals involved in similar situations,
4 and at that time you said, in light of the fact
5 that the contempt occurred before other judges,
6 and therefore, they were familiar, and in addition,
7 the fact that it was not a personal type
8 of contempt, that the cases should be transferred
9 to those judges.

10 THE COURT: That's right.

11 MS. KATZ: The procedure is when I went
12 down to have it transferred is that our office
13 had to make a formal request to Judge Mishler
14 who is the Chief Judge.

15 I wrote on Thursday, and on Friday a letter
16 was sent from our office to Judge Mishler explaining
17 the situation and requesting that it be transferred
18 to the appropriate judge.

19 THE COURT: The individual judges before
20 whom the contempt was committed. I've always had
21 it that way.

22 I see no reason for this. I'm going to
23 give this back to you because I'm not the proper
24 judge to handle it. Judge Judd knows all about
25 it. He knows whether or not there will be a

1 separate trial. He may order him to answer the
2 questions and if he doesn't, why, they will
3 bring him back and he thereafter will impose
4 the contempt order on him again.

5 It ought to be done very rapidly because
6 I understand the six months is about to expire.

7 The Grand Jury under which --

8 MS. KATZ: The Grand Jury under which
9 he was brought before is still sitting, your Honor,
10 and will sit until May of this year.

11 THE COURT: In the meantime, we will just
12 have to put it down for another day and not be-
13 fore me.

14 MS. KATZ: I believe I should receive a
15 reply from Judge Mishler's office today, and then
16 I will set up an appropriate date as soon as
17 possible.

18 THE COURT: You will put it before the other
19 judge.

20 MS. KATZ: That is what I have requested.

21 THE COURT: All right.

22 MR. MONTELL: May I at this time hopefully
23 possibly answer the unanswered question in that
24 he is not represented?

25 THE COURT: He might want to answer them

1 and he's not represented.

2 MR. MONTELL: Yes, that he is not represented
3 by me, sir.

4 THE COURT: He's not represented by you.

5 MR. MONTELL: Right.

6 THE COURT: You have an idea if an attorney
7 is appointed for him, he might want to answer the
8 questions; is that what you are saying?

9 MR. MONTELL: I couldn't possibly answer
10 that question.

11 THE COURT: What are you staying?

12 MR. MONTELL: Only that he is not repre-
13 sented.

14 THE COURT: I see that. He will get a
15 lawyer.. We will see if we can appoint one.
16 I know he's not represented, but he can't do any-
17 thing about it as to what judge is going to hear it.

18 MS. KATZ: I didn't hear the beginning
19 because I was late, but has Mr. Fusco made an
20 application for a Court-appointed lawyer?

21 If that is his desire, maybe we could do
22 that today so that when it is assigned to the
23 judge, we can have an attorney present.

24 THE COURT: I will do that.

25 THE DEFENDANT: I don't want the U. S.
attorney appointing a lawyer for me.

1 MS. KATZ: Maybe you can explain that the
2 U. S. attorney has nothing to do --

3 THE COURT: The U. S. attorney has nothing
4 at all to do with it. We have a list of attorneys
5 who are on the Criminal Justice Act, which is an
6 act which provides for attorneys for those who
7 are unable to afford attorneys in a criminal
8 action, provided you sign an affidavit that you
9 have no assets and cannot afford one. That an
10 assignment is made by the judge, if we can get
11 a lawyer, to represent you.

12 How about the president of the Brooklyn Bar
13 Association, Mr. Lombardo?

14 I can't tell you right now. I have to get
15 in touch with him.

16 THE DEFENDANT: Right.

17 THE COURT: So I will be in
18 touch with him and you hang around here, maybe
19 hang around and Mr. Lombardo can come down right
20 away or within the next two or three hours.

21 * * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA :

against :

JOHN MAURO	:	75 CR 816
ROBERT SMITH	:	75 CR 817
ROBERT MARINO	:	75 CR 818
JOHN FUSCO	:	75 CR 819

Defendants

-----X

United States Courthouse
Brooklyn, New York

November 24, 1975
9:30 a.m.

B e f o r e:

HONORABLE JOHN R. BARTELS,

U. S. D. J.

SHELDON SILVERMAN
Court Reporter

Appearances:

DAVID G. TRAGER, Esq.
United States Attorney for the
Eastern District of New York

By: MARSHA KATZ, Esq.
Special Attorney

RICHARD ROSENKRANZ, Esq.
Attorney for Defendant Smith

1 MS. KATZ: This defendant said he did not
2 want a court-appointed lawyer and he would obtain
3 his own.

4 THE COURT: We'll have to put these cases
5 down for trial.

6 MS. KATZ: Yes, perfectly all right.

7 THE COURT: Mr. Mauro, where is your lawyer?

8 DEFENDANT MAURO: I spoke to him Friday
9 afternoon. At that time he knew nothing about it.

10 THE COURT: Of course he didn't. You've
11 got to tell him something about it.

12 MR. MAURO: I didn't know until last night
13 until the court list came out.

14 THE COURT: Didn't you serve him with an
15 indictment?

16 MS. KATZ: We sent a notice to Mr. Murphy,
17 the attorney of record on the last case concerning
18 the indictment, the appearance. I don't know
19 why he stated -- we also informed Mr. Murphy there
20 was going to be a court appearance, at least my
21 secretary called his office. I don't know if she
22 spoke to Mr. Murphy or not.

23 DEFENDANT MAURO: I spoke to Mr. Murphy
24 Friday afternoon. He knew nothing. Last night
25 I spoke to my wife--

1 THE COURT: Maybe he didn't get the indict-
2 ment. When did you sent it to him?

3 MS. KATZ: Dated 11/3/75, it says, following
4 names of defendants and their attorneys, it said it
5 was John Mauro, Auburn Correctional Facility,
6 Attorney Murphy, 123-40 83rd Avenue, Kew Gardens,
7 New York.

8 DEFENDANT MAURO: Notice to grand jury
9 stenographer.

10 MS. KATZ: She sends out the pleading notices,
11 your Honor. This is the copy we get back indicating
12 the notices had been sent.

13 THE COURT: He hasn't any lawyer.

14 MS. KATZ: Says it was mailed November 5th,
15 1975, according to another document that I have.

16 THE COURT: You're going to have to get a
17 lawyer. Do you want the same one?

18 DEFENDANT MAURO: Yes, your Honor.

19 THE COURT: Can you get in touch with him
20 today?

21 DEFENDANT MAURO: I called my wife last night
22 after I saw the court notice. I told her to put
23 it on the service and she'll try to get to him today.

24 THE COURT: We'll have to have another status
25 report. You've got to tell him to be down here.

1 Otherwise I'm going to set the case down for trial.
2 We can't dilly-dally. Why can't you get in touch
3 with him right now?

4 MR. MAURO: If I can get to a phone.

5 THE COURT: Why can't that be done?

6 MS. KATZ: I don't know, your Honor.

7 THE COURT: Where is the Marshal?

8 MARSHAL: Yes, your Honor?

9 THE COURT: Why can't he make a phone call?

10 MARSHAL: He can if you say so.

11 THE COURT: Make a phone call, come back and
12 we have more matters. Send him down for a phone
13 call.

14 Let's do it this way: Tell him to come down
15 here tomorrow at 9:30. Then he can put in a plea and
16 we can fix a date. Call him up and you'll come back
17 here while I'm here.

18 (Recess)

19 MS. KATZ: We're going to have a problem
20 with Mr. Smith. He said he wanted to arrange for
21 his own attorney.

22 THE COURT: We'll see what's going to happen.
23 They're all coming tomorrow or I'll appoint a lawyer.

24 This is Robert Smith.

25 Have you got a lawyer?

1 DEFENDANT SMITH: No, I haven't, your Honor.

2 THE COURT: Do you want to get your own lawyer?

3 DEFENDANT SMITH: I can't afford it, your
4 Honor.

5 THE COURT: You want me to appoint somebody
6 for you?

7 DEFENDANT SMITH: Yes.

8 THE COURT: Let me think about it. I've got
9 a long list and I'll pick out within the next ten
10 minutes. I'll have one for you.

11 (Recess)

12 MS. KATZ: I stated if this defendant could
13 not afford one, the Court would appoint one. I don't
14 know if he has an attorney or not.

15 THE COURT: Have you got a lawyer, Mr. Marino?

16 DEFENDANT MARINO: Yes, I do.

17 THE COURT: Who is he?

18 DEFENDANT MARINO: Ira Cooper.

19 THE COURT: Did you tell him to come here
20 tomorrow so we can fix a date of trial?

21 DEFENDANT MARINO: When we were in court last
22 week he was on trial. He took out time to come here
23 then. I don't know if he was notified about today.

24 THE COURT: The only point-- Well, I guess
25 we might make it Wednesday instead of tomorrow

1 morning.

2 MS. KATZ: I would prefer tomorrow morning.
3 I'm going out of town for the holidays.

4 I could have somebody from my office cover
5 for me on Wednesday.

6 THE COURT: The only point is I want to give
7 them fair notice. It only takes five minutes to
8 fix a date of trial. I assume they're going to
9 plead not guilty, all of them.

10 MS. KATZ: I would assume, your Honor.
11 I would arrange for someone from my office to
12 represent our office on Wednesday.

13 THE COURT: Let's get as many down tomorrow
14 as we possibly can.

15 DEFENDANT MARINO: Might I call my lawyer now?
16 I can find out right away.

17 THE COURT: It will only take five minutes
18 to fix the date of trial with the others. You
19 can't join all these other defendants.

20 MS. KATZ: There will be a problem--

21 THE COURT: Separate trials.

22 MS. KATZ: I believe so, your Honor.

23 THE COURT: We'll have all separate trials.

24 MS. KATZ: Two of them were held in civil
25 contempt and the proceedings before Judge Judd were

1 done together. It is possible, I guess, to try
2 those two together.

3 THE COURT: Why don't we take it up with the
4 lawyers to see whether we'll try them all together.
5 I don't see why not. It's the same issue, exactly
6 the same issue. It arises out of the same transac-
7 tion.

8 MS. KATZ: All called before the grand jury.
9 The grand jury -- it was the same investigation in
10 the grand jury. They were all asked approximately
11 the same questions.

12 THE COURT: I think they can be tried all
13 together. I'm pretty sure all these other defend-
14 ants can be. In order to conserve judicial time,
15 it would seem that's a proper way to handle it.
16 No point--

17 MS. KATZ: If your Honor wishes, I will
18 submit a memorandum of law on the issue.

19 THE COURT: Yes, then we can get it all over
20 with, one way or the other. See if you can bring
21 your lawyer down. I'll be here at nine o'clock if
22 he wants to come in.

23 DEFENDANT MARINO: Tomorrow morning.

24 THE COURT: Is he trying a case somewhere?

25 MR. MARINO: He didn't say. When he was here

1 last week he told me he took time out, that's why
2 he couldn't talk to me. I haven't seen him since.

3 THE COURT: Do you know where he's trying a
4 case?

5 MS. KATZ: I'm not aware he was on trial.

6 THE COURT: Try to get him here -- no use
7 trying to get him here unless all will come
8 together.

9 MS. KATZ: Would you want to postpone until
10 next week?

11 THE COURT: I think that's smart. Let's
12 postpone it until next Monday at 9:30.

13 MS. KATZ: Is it possible to do it on
14 Tuesday? I have a prior commitment on Monday
15 morning.

16 THE COURT: Yes, its possible to do it on
17 Tuesday. Make it Tuesday at 9:30.

18 MS. KATZ: Did your Honor want our office to
19 contact the lawyers or do you want to instruct the
20 defendants? You've got--

21 THE COURT: You've got a lawyer.

22 MR. MARINO: Yes, your Honor.

23 THE COURT: Tell him next Tuesday, at 9:30.

24 Mr. Fusco, you've met Mr. Corbett, your
25 lawyer?

1 DEFENDANT FUSCO: Yes, your Honor.

2 THE COURT: What's your plea?

3 MR. CORBETT: Not guilty, sir.

4 THE COURT: You'll have to come next Tuesday.

5 MR. CORBETT: If it has to be it has to be.

6 THE COURT: If it's agreeable, you'll call
7 these other lawyers.

8 MS. KATZ: Yes, I'll call the other lawyers.
9 I ask the record show I've given Mr. Corbett a copy
10 of the indictment as well as a copy of the memoran-
11 dum of law the Government has submitted in this case.

12 MR. CORBETT: That's it; I've received it.

13 THE COURT: What we're waiting for, I suppose
14 we've got to appoint a lawyer for Mr. Smith.

15 MS. KATZ: I believe he indicated he wishes to
16 have a court-appointed lawyer.

17 THE COURT: Mr. Mauro is calling up.

18 MS. KATZ: Yes, he's calling Mr. Murphy.
19 We might as well not have Mr. Murphy come until
20 next Tuesday. I'll contact Mr. Cooper's office for
21 Mr. Marino.

22 THE COURT: So we'll just have to appoint
23 for Mr. Smith. Mr. Fusco didn't want two lawyers.
24 We'll have to satisfy him with one.

25 I have a list of lawyers available.

1 MR. CORBETT: Just one thing, Judge. The
2 defendant reminded me. We had a conference on Fri-
3 day. He told me that the authorities at the M.C.C.
4 are keeping him and his co-defendants on this matter
5 on separate floors. They're not allowing them to
6 meet.

7 THE COURT: Is there any objection to that?

8 MR. CORBETT: Well, his objection is that he
9 wishes to discuss his case with his co-defendants
10 with a view to preparing for trial.

11 THE COURT: I don't believe there's any right
12 at all that I know of that a prisoner can demand to
13 speak to other prisoners. I don't know of any such
14 right.

15 MS. KATZ: In light that this is a criminal
16 contempt stemmed out of grand jury proceedings
17 by its very nature are secretive, I don't think it
18 would be appropriate.

19 THE COURT: I can't give you relief on that.

20 MR. CORBETT: I'll write to the warden of
21 the M.C.C.

22 THE COURT: You're not getting my court order.

23 MR. CORBETT: I realize that.

24 THE COURT: It seems to me, Mr. Corbett,
25 there is no question they refused to answer.

1 MR. CORBETT: Yes.

2 THE COURT: I don't know what there is going
3 to be, but if that isn't the case we can obviate the
4 necessity for a trial.

5 MS. KATZ: Mr. Fusco did begin to testify
6 before the grand jury. We then reached a point where
7 a question was asked to which he no longer wished
8 to continue. After consulting with his attorney,
9 who was present outside the grand jury room during
10 this testimony, he came back and he stated -- I don't
11 know the exact words -- that he did not want to
12 answer. We then asked him another series of ques-
13 tions, all of which he stated --

14 THE COURT: Where is that attorney?

15 MS. KATZ: He stated he's no longer on the
16 case, Mr. Leone.

17 DEFENDANT FUSCO: She has it wrong.

18 THE COURT: The Borough President.

19 MS. KATZ: I apologize.

20 DEFENDANT FUSCO: Ed Montell. The reason
21 my attorney -- he stated in the court. They have
22 the minutes, when we went in front of Justice Judd,
23 she went beyond the scope of what she said originally,
24 sent us into the room, explained to what we would be
25 questioned on. That's our argument. I'm right now

1 at the present time taking my hearings on my original
2 case, that this grand jury stemmed from and I felt
3 by going--

4 THE COURT: Wait a minute. You're taking
5 your hearings, you mean taking the grand jury?

6 DEFENDANT FUSCO: This grand jury was formed
7 from the circumstances of my case where I was con-
8 victed of. Now--

9 THE COURT: Grand jury formed from the cir-
10 cumstances of the case? Do you understand?

11 DEFENDANT FUSCO: This grand jury stemmed from
12 my case.

13 MR. CORBETT: Mr. Fusco is addressing himself
14 to the Court. He took a plea in the State Court.
15 He is now taking that plea.

16 THE COURT: That's not here.

17 DEFENDANT FISCO: I understand, your Honor.

18 MR. CORBETT: He's taking by a writ of
19 coram nobis. If the plea falls in the State Court
20 and is restored to the trial calendar in the State
21 Court, then the deal, if there was one made, will
22 then fall by itself.

23 THE COURT: This has nothing to do with
24 his obligation to testify before the grand jury if
25 he's given immunity.

1 MR. CORBETT: I'm pointing out Mr. Fusco's
2 position.

3 DEFENDANT FUSCO: Back again to what I said,
4 I was put in the room with my attorney and the U.S.
5 Attorney.

6 THE COURT: You have to take the consequences
7 of that.

8 DEFENDANT FUSCO: No alternative.

9 THE COURT: Wait a minute. This is a situa-
10 tion where the facts are all agreed to.

11 MS. KATZ: Your Honor, I would assume that it
12 probably is.

13 THE COURT: Why do you need a jury trial on
14 facts that are already agreed to?

15 MS. KATZ: It is the Government's position in
16 light of the fact Mr. Fusco could be subject to a
17 sentence--

18 THE COURT: I understand your position.

19 MS. KATZ: Therefore, he must be offered the
20 right of a jury trial. The Government would cer-
21 tainly waive the right to the grand jury trial if
22 Mr. Fusco consented to that. It is my understanding
23 now that Mr. Fusco is demanding his rights to a jury
24 trial and confrontation of witnesses.

25 THE DEFENDANT FUSCO: I would like to bring

1 this out. The reason I went into this courtroom
2 pleading not guilty was for the simple fact-- first
3 of all, when I appeared in front of Judge Judd and
4 I was given a civil contempt, my rights were never
5 explained to me. I was never told out of this process
6 of law I would be brought down before ever going
7 back to another grand jury and given a criminal
8 contempt. This was never explained to me. I'm
9 under the impression, your rights, as when you stand
10 before a judge, when you're being charged with some-
11 thing.

12 THE COURT: If you'll plead guilty, we'll
13 explain it to you. You have a lawyer who will explain
14 it to you. I would say this: I don't know where or
15 who advised you, if in fact you have been ordered--
16 you've been, No. 1, given immunity and then, two,
17 ordered to testify, and, three, you refused. It
18 would seem to me, offhand, your guilt would be
19 pretty obvious.

20 DEFENDANT FUSCO: Yes, your Honor, but now
21 I went in front of Judge Judd and I was given six
22 months on a civil contempt. Now I went back to
23 Clinton -- Danamora.

24 THE COURT: You didn't serve the six months
25 because you're serving the State.

1 DEFENDANT FUSCO: I don't know what you mean
2 by not serving it. Because of the six months I was
3 denied all privileges up in Clinton.

4 THE COURT: He ordered you again to serve.

5 DEFENDANT FISCO: No.

6 MS. KATZ: I don't know why he's saying he
7 was ordered to serve six months. The order for
8 Mr. Fusco states that he's to be released in custody
9 until, for the life of the Special May 1974 Special
10 Grand Jury, which is still presenting, sitting, or
11 until such time as he purges himself of this con-
12 tempt. I don't know where this six months comes
13 in. In addition, I will submit to the Court the
14 transcript of the proceeding before Judge Judd and
15 I'll give a copy to Mr. Corbett. It was explained
16 to Mr. Fusco. What I would state is very clear,
17 the obligation and exactly what his rights were.
18 His attorney made certain arguments. Judge Judd
19 ruled on those arguments and explained to Mr. Fusco
20 that he has ruled on these arguments and that he must
21 testify before the grand jury. I will submit the
22 copy to your Honor to show what actually transpired
23 so that you don't have to take either my remembrance
24 of it or Mr. Fusco's remembrance, because it was
25 transcribed.

1 THE COURT: It raises a question whether this
2 isn't being punished twice for the same crime.

3 DEFENDANT FUSCO: That's what I'm trying to
4 bring out.

5 MS. KATZ: The Court decision is, civil con-
6 tempt is one thing and criminal contempt is another.

7 THE COURT: I recall a number of decisions
8 on that. Otherwise, Mr. Fusco, this is not a game.

9 DEFENDANT FUSCO: I don't say it's a game.

10 THE COURT: Whatever you say your lawyer
11 says, it seems to me that we could not be able to
12 conduct investigations or court proceedings if
13 witnesses could defiantly refuse to testify and
14 the court would be without power to impose a sentence.
15 I would think that would be a very unusual situa-
16 tion, one which would defeat the administration of
17 justice. You ought to keep that in mind, Mr. Corbett,
18 because I believe at this time the man has an
19 opportunity which he won't have later, if he is
20 found guilty. There's no use resorting to what
21 I would think is an exercise in futility. I'm not
22 making this as a decision. I could be wrong. I've
23 read the cases, your brief this morning, and although
24 I was a little surprised at first because I didn't
25 think you could bring a criminal proceeding, but

1 I think you can. Here we are.

2 That's all right, that's up to him and you,
3 for you to make your proper decisions and the other
4 defendants, also. It may be they have strong reasons
5 why they shouldn't testify. It could be they would
6 prefer to have a trial. That's their choice,
7 their option in the United States.

8 DEFENDANT FUSCO: I'm still totally confused
9 whether or not I was sentenced.

10 THE COURT: Even if you were, that was on
11 the civil case. This is a criminal matter. You're
12 not prevented from being prosecuted criminally.
13 Mr. Corbett will tell you.

14 DEFENDANT FUSCO: Thank you, your Honor.

15 THE COURT: Mr. Mauro, we're going to put
16 this case down for status report next Tuesday at
17 9:30. You can get in touch with your lawyer,
18 Mr. Murphy, and tell him.

19 DEFENDANT MAURO: Fine, your Honor.

20 THE COURT: Try to get in touch with him within
21 the next couple of days, to be here at 9:30 on
22 Tuesday, December 2nd, 9:30. If you can't get in
23 touch with him, you'd better tell Ms. Katz or write
24 him, too.

25 MS. KATZ: I intend to write him or call

1 his office, your Honor. I just felt Mr. Mauro
2 should know what transpired.

3 DEFENDANT MAURO: I spoke to his secretary.
4 He wasn't in, but she was going to leave the message
5 about tomorrow.

6 THE COURT: You'd better cancel that.

7 DEFENDANT MAURO: Either to try to call you or
8 the Judge.

9 THE COURT: Can you cancel it?

10 Mr. Smith, have you talked to Mr. Rosenkranz?

11 DEFENDANT SMITH: Yes.

12 THE COURT: You're satisfied with him as your
13 lawyer -- did you go over these matters?

14 DEFENDANT SMITH: Briefly, your Honor.

15 MR. ROSENKRANZ: We're ready to enter a plea
16 of not guilty.

17 THE COURT: Mr. Smith wanted to say something.

18 DEFENDANT SMITH: That I just had a few
19 moments with the attorney here and we didn't go into
20 depth.

21 THE COURT: You're not supposed to here. What
22 I'm interested in is your assets, whether--

23 MR. ROSENKRANZ: I have a financial affidavit.

24 THE COURT: That's what I want.

25 You don't want me to sign this other document.

1 THE CLERK: No, your Honor.

2 THE COURT: He didn't put down his debts and
3 monthly bills.

4 MR. ROSENKRANZ: This defendant is incarcerated.
5 I don't know if he has any monthly bills.

6 THE COURT: He could have had them before he
7 went in.

8 DEFENDANT SMITH: I'm legally dead.

9 THE COURT: What do you mean?

10 DEFENDANT SMITH: Serving a life term.

11 MS. KATZ: Minimum of six years to a maximum
12 of life.

13 THE COURT: What is the offense?

14 MR. ROSENKRANZ: Narcotics, pleaded guilty in
15 Queens Countu, is serving a six-year to life
16 sentence.

17 THE COURT: Not guilty?

18 MR. ROSENKRANZ: Yes, not guilty.

19 MS. KATZ: I have given Mr. Rosenkranz a copy
20 of the indictment as well as the memorandum of law
21 the Government has submitted to your Honor. You've
22 adjourned it to Tuesday to set a trial date.

23 THE COURT: We would like to try all four
24 together if it's possible. It may not be possible,
25 the cases may be different. If so, we'll try them,

1 one, two, three, four, after each other. Mr. Rosen-
2 kranz, I wish you would go over the case carefully,
3 I know you will, and advise the defendant as to
4 his rights, his obligations and the possibilities of
5 his success or failure in this case. I mention that
6 to you because in criminal contempt cases of this
7 type where he's given complete immunity, the chances
8 of his success would be or should be weighed very
9 carefully.

10 If you find that they are almost nil, then
11 I know you would take the proper action to advise
12 him, because all the Government is asking him to
13 do is testify. You and I know that no one can
14 refuse to testify unless the testimony will violate
15 his Fifth Amendment rights. Here we are giving him
16 immunity. I say "we," I mean "we" is the Government.
17 A trial will not help him. Apparently someone
18 has advised these men not to testify. That raises
19 a very serious question.

20 This is a criminal contempt which is not
21 limited to six months. It will follow the present
22 incarceration. You raise a question of what are
23 his chances of success.

24 MR. ROSENKRANZ: I would like to understand
25 that he's been sentenced under a civil contempt by

1 Judge Costantino. I would wonder what sentence.

2 THE COURT: It couldn't be more than six
3 months.

4 MS. KATZ: Some of the contempt orders simply
5 said the life of the grand jury. I believe some of
6 them also said the life of the grand jury or six
7 months.

8 THE COURT: Whichever is the smaller.

9 MS. KATZ: Because they are presently, as
10 I've explained before, because they're incarcerated
11 under a State sentence, they were returned to the
12 State and therefore cannot serve any of the time.

13 THE COURT: You can't suspend a State
14 sentence so there's no incentive.

15 MS. KATZ: I believe, your Honor, in addi-
16 tion the brief sets out the relevant cases that
17 civil contempt or criminal contempt are two dis-
18 tinct offenses.

19 THE COURT: Yes.

20 MS. KATZ: The fact that he has been found in
21 civil contempt and sentenced or not sentenced is
22 really irrelevant to a criminal contempt prosecution.

23 MR. ROSENKRANZ: I understand it's on for
24 9:30 on Tuesday.

25 THE COURT: We'll put the case down for trial.

1 I don't think you need any particulars.

2 MR. ROSENKRANZ: If there are any, I'm sure
3 Ms. Katz will give me what she can.

4 MS. KATZ: The Government will turn over
5 the transcripts.

6 THE COURT: You might want to look at the
7 transcripts to see what it is.

8 MS. KATZ: The proceedings to the various
9 defense attorneys, and I believe the civil contempt
10 orders are on file in the courthouse, the dates
11 appear in the brief outlining when each individual
12 defendant appeared.

13 In addition, we will make available copies of
14 the grant of immunity for each of the defendants.
15 I don't believe there's anything else in this case.

16 THE COURT: I guess he wants to see whether
17 the grand jury is properly impaneled, also, what's
18 the authority, because the questions asked might not
19 be in the purview of their investigative authority.
20 We'll have to look at that.

21 MS. KATZ: I'm sure the Government, if Mr.
22 Rosenkranz and the other defense attorneys make the
23 proper motions, it will be taken care of.

24 ---
25

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

against

JOHN FUSCO
ROBERT MARINO
ROBERT SMITH
JOHN MAURO

Defendants

:

:

:

:

:

:

75 CR 819
75 CR 818
75 CR 817
75 CR 816

United States Courthouse
Brooklyn, New York

December 2, 1975
9:30 a.m.

Before:

HONORABLE JOHN R. BARTELS,

U. S. D. J.

SHELDON SILVERMAN
Court Reporter

Appearances:

DAVID G. TRAGER, Esq.
United States Attorney for the
Eastern District of New York

By: MARSHA KATZ, Esq.
Assistant U.S. Attorney

JOHN CORBETT, Esq.
Attorney for Defendant Fusco

IRA COOPER, Esq.
Attorney for Defendant Marino

RICHARD ROSENKRANZ, Esq.
Attorney for Defendant Smith

STEPHEN MURPHY, Esq.
Attorney for Defendant Mauro

1 THE CLERK: Criminal cause status report,
2 United States versus John Mauro, Robert Smith,
3 Robert Marino, and John Fusco.

4 THE COURT: Good morning, gentlemen.

5 You understand the nature of these indict-
6 ments? The question is, I suppose, whether they
7 should all be tried at the same time or separately.

8 MS. KATZ: I've done research of the question
9 that you had raised the last time as to the joinder
10 of offenses. Under U.S.v. Gentile, 60 F.Res. 686,
11 District Court case from this district, a case out
12 of our office--

13 THE COURT: Federal Reserve decision? I never
14 heard of that.

15 MS. KATZ: I'm sorry. Federal Rules decision,
16 District Court case out of this district, 686. It
17 tends to suggest under that decision that it would
18 be improper on this case, although it would seem that
19 the acts of the defendants arose out of the same
20 series of transactions they were really independent.
21 They were each called to the same grand jury, each
22 asked the same series of questions, yet the con-
23 tempt itself was individual of each other.

24 THE COURT: That doesn't offer too much of a
25 problem. We'll try them one after each other.

1 I would think it would be up to the defendants. You
2 would probably want all separate trials, do you?

3 MR. MURPHY: That's correct.

4 THE COURT: Four trials. We'll give it to
5 you. Who wants to go first? Don't all raise your
6 hands.

7 MR. MURPHY: I'm starting a trial next week
8 in front of Judge Neaher.

9 THE COURT: How are you fixed for the trials
10 of these cases?

11 MS. KATZ: I have three trials set for
12 January. It would have to be either fairly soon or
13 in February.

14 THE COURT: I don't have any trials, you know.

15 MS. KATZ: I'll give you some of mine, your
16 Honor.

17 THE COURT: My books are clean, just waiting
18 for these cases.

19 Do you want it in February?

20 MR. COOPER: Yes.

21 MR. ROSENKRANZ: Yes.

22 MR. MURPHY: It's not good for me. I'm on
23 trial before Judge Mishler.

24 THE COURT: Something has to be good for you.
25 You'll try the first one in December. You can't do

1 that? I'm giving you your pickings now. You can't
2 go too far with this.

3 MR. MURPHY: January would be good for me.
4 I'm starting a trial before Judge Neaher next Monday.

5 THE COURT: You're starting a trial here one
6 of these days. You'd better put that down.

7 I'll give you a certificate. You can't start
8 all those trials.

9 MS. KATZ: If you can give us an approximation
10 of how long your trial before Judge Neaher will last?

11 MR. MURPHY: A week to ten days.

12 MS. KATZ: I begin a trial on the 5th of
13 January before Judge Platt. Would it be possible
14 to try it before that and the remaining three in
15 February?

16 THE COURT: I would like to take these one,
17 two, three, four. I would like to go right straight
18 through, but that's not necessary. We can't-- Can
19 we do much before February? I'm going to be away a
20 week in February. Let there be no doubt about that.
21 We only have one day open in February.

22 Do you have anything in January?

23 We can fit one or two the week of February 2nd.
24 I have the form for February.

25 MS. KATZ: All four cases?

1 Your Honor, who do you want to go on the 4th
2 of February?

3 THE COURT: Mr. Corbett is ready.

4 MR. CORBETT: Yes, I'll go, with Mr. Fusco.

5 THE COURT: How about the 9th of February?
6 How about you, Mr. Rosenkranz-- No, we'll take
7 Mr. Cooper.

8 MR. COOPER: Yes, Judge?

9 THE COURT: The 9th.

10 MR. COOPER: February 9th.

11 THE COURT: It has to be finished soon.

12 MS. KATZ: You represent Mr. Marino?

13 MR. COOPER: That's correct.

14 THE COURT: These are not going to last more
15 than one day?

16 MS. KATZ: I don't expect the presentation
17 of the Government's case, certainly no more than a
18 day and a half, your Honor.

19 THE COURT: Now we've got two of them.
20 Now we have to go to March for the other ones,
21 gentlemen.

22 Wednesday, March 3rd?

23 MR. MURPHY: The only problem I have there--

24 THE COURT: You've got a lot of problems.

25 MR. MURPHY: I'm starting a trial in front

1 of Mishler on the 23rd of February. Probably I'll
2 be finished by then, but I prefer--

3 THE COURT: How many defendants?

4 MR. MURPHY: Four defendants, Judge.

5 THE COURT: Do you think it will last longer
6 than a week?

7 MR. MURPHY: It could.

8 THE COURT: Who's ready for March 3rd?

9 MR. ROSENKRANZ: March 3rd is fine, your Honor.

10 THE COURT: We need one more. This one you
11 are going to get. March 17th, Mr. Murphy? You won't
12 march in the parade that day, Mr. Murphy.

13 MR. MURPHY: Very well, Judge.

14 THE COURT: We'll give you all certificates.
15 Gentlemen, I'll mail them to you.

16 MR. ROSENKRANZ: Can we defer talking to the
17 defendants here? Last time they wanted to return.

18 THE COURT: We have to be fair to the warden.
19 You can't stay from December to March 17th. Miss
20 Katz, they have a lot of problems over there. It's
21 overcrowded.

22 MS. KATZ: The Government is willing to do
23 whatever you direct us to do. We'll either send
24 them back or writ them down.

25 THE COURT: Writ them down. You can leave

1 them here a week and writ them down.

2 MS. KATZ: When would you like them to
3 return, three or four days before the trial?

4 THE COURT: Three or four days before the
5 trial, yes. We can't keep them here.

6 MR. MURPHY: I might want to make motions.

7 THE COURT: You'd better make them right
8 away. You can make them right now. It's a simple
9 case.

10 What motions are you going to make?

11 MR. MURPHY: First of all, I would like to
12 make a motion to have hearings on the wiretaps that
13 were involved here.

14 THE COURT: Wiretaps? Wait a minute.

15 MS. KATZ: There are and there aren't.

16 THE COURT: The question that I understand
17 that's really relevant, he was called to testify
18 before the grand jury and he's given immunity.
19 Where do you get wiretaps?

20 MR. MURPHY: On the initial case--

21 THE COURT: What relevance is that?

22 MR. MURPHY: I believe he has a right to
23 attack those wiretaps if they're found illegal.

24 THE COURT: You'd better write a very good
25 brief on that and let's make that motion right away.

1 You don't have to wait until you start a trial before
2 Judge Mishler on that motion. You can do that right
3 away. Is that relevant, Ms. Katz?

4 MS. KATZ: It would seem to me, from my
5 understanding of the law, it's not relevant. It
6 could have been at the time they were served to
7 appear before the grand jury.

8 THE COURT: Why would it be even then?

9 MS. KATZ: I understand there is some case law
10 that allows them to make a very minimal attack on
11 wiretap.. It is not a hearing on the wiretap.
12 It is just whether there is an order signed by a
13 judge, which we do have.

14 THE COURT: They're not being tried for that.

15 MS. KATZ: It's whether there was a prima
16 facie valid wiretap signed by a judge.

17 THE COURT: The issue here is, Can he refuse
18 to testify after he's been given immunity? I don't
19 see what wiretaps have to do with it at all.

20 MS. KATZ: I agree that at this point there
21 is a criminal contempt. The issue of the wiretap has
22 nothing to do with it.

23 THE COURT: After you've brought an action
24 against him-- You can't bring an action against him
25 in connection with this testimony except the one

1 you're now bringing that he's refused to testify.
2 You'd better make your motion fast.

3 MS. KATZ: Whatever your ruling, it will be
4 applicable to the others?

5 THE COURT: What other possible motions can
6 you make here?

7 MR. MURPHY: Attacking the indictment.
8 I haven't seen it.

9 THE COURT: You'd better make those motions
10 within fifteen days.

11 MS. KATZ: Could I ask all defendants make
12 their motions within fifteen days?

13 THE COURT: That's right.

14 MR. COOPER: Rather than get these people back
15 from the institution, of course with their consent,
16 I speak on behalf of Robert Marino, would it be pos-
17 sible to have him remain at the institution at least
18 until the beginning of January?

19 THE COURT: I have no objection except that
20 Warden Jensen has need for all that space in there
21 for detainees before trial. It's just unfair. These
22 men are going to be there for a long time. They're
23 already in jail; is that true?

24 MR. COOPER: That's correct.

25 THE COURT: I'm not going to do it. The answer

1 is I give you a week before they come to trial.

2 MR. CORBETT: Mr. Fusco has expressed a
3 desire to go back to Danamora at this time, if your
4 Honor can satisfy his writ.

5 MS. KATZ: We will have him writted down
6 February 1st for the February 4th trial, unless you
7 want a different date.

8 MR. CORBETT: I'll be in touch with you in
9 January.

10 MS. KATZ: Other than Mr. Fusco, we will keep
11 Mr. Marino, Mr. Smith and Mr. Mauro here one week
12 from today, I believe, and then we will bring them
13 back--

14 THE COURT: Unless they want to come down
15 sooner.

16 MS. KATZ: Very well.

17 You wanted to determine whether they can
18 stay, whether it's permissible for them to stay here?

19 MR. MURPHY: If the warden has no objection,
20 can they stay?

21 THE COURT: Call him up and tell the warden
22 if he has any objection, they'll go. If he's not
23 crowded, I have no objection, of course, if it's not
24 too crowded for them to stay. If it's crowded, he
25 has no room, they go. That's simple. You can pick

1 up a phone. I can do it myself, but there's no
2 problem here. That's done all the time.

3 MS. KATZ: I'd be happy to call the warden.

4 THE COURT: It's a chance to get more
5 experience. Call the warden of the prison.

6 MS. KATZ: I would ask for the record that
7 the other three defendants express on the record
8 their desire, if the warden concurs.

9 MR. ROSENKRANZ: Mr. Smith prefers to remain
10 in the M.C.C.

11 MR. MURPHY: As does Mr. Mauro.

12 MR. COOPER: Mr. Marino joins in that request.

13 THE COURT: I can well understand; it's a
14 lovely spot. People are breaking in instead of
15 breaking out.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA, :
 :
 -against- :
 :
 JOHN MAURO, :
 Defendant. :
 :
 -----X

United States Courthouse
Brooklyn, New York

March 17, 1976
10:00 O'clock A.M.

B e f o r e :

HON. JOHN R. BARTELS, U.S.D.J.

HENRI LE GENDRE
Acting Official Court Reporter

APPEARANCES:

DAVID G. TRAGER, ESQ.,
United States Attorney
for Eastern District of New York

BY: M. KATZ

KEVIN ROSS, ESQ.,
Attorney for Defendant

1
2 THE CLERK: Criminal Cause for Trial,
3 United States of America vs. John Mauro.

4 MR. ROSS: I'm appearing for Mr. Mauro.

5 THE COURT: Are you a member of the Bar?

6 MR. ROSS: In this Court I've not been admitted.

7 THE COURT: You can't appear to try a case.
8 You could appear here this morning, of course, but
9 I would suggest you become a member.

10 Now, what were you going to say?

11 MS. KATZ: I was just going to say that
12 you had indicated to myself and I indicated to
13 Mr. Murphy that you would not be able to try this
14 case this morning.

15 THE COURT: No point, he didn't have to come
16 for this purpose.

17 MS. KATZ: I understand.

18 THE COURT: I'm trying this case, the jury
19 is here now.

20 MS. KATZ: Did you want to adjourn it? There
21 is a problem with six months rule. I don't believe
22 Mr. Mauro --

23 THE COURT: He won't suffer too much.

24 MS. KATZ: He's incarcerated not in this
25 case, but the speedy trial act would run as of

1 May 3rd and I don't believe there was ever any
2 discussion with the defendant about the possibility
3 of it not being tried in the six months.

4 THE COURT: You are right. I can only say
5 this is only going to take a day; isn't it?

6 MR. ROSS: Could I point out for the record
7 that a detainer has been lodged against the
8 defendant since June of last year. There might be
9 some sort of a speedy trial problem.

10 MS. KATZ: I think we have already disposed
11 of the issue when the six months begins to run and
12 it had begun to run at the point of indictment in
13 this case under 18USC41 --

14 THE COURT: Any question about speedy trial
15 you better either tell me whether you're going to
16 waive it or not. I'm certainly not going to let
17 this case slide off on any technicality.

18 MR. ROSS: It's my understanding that
19 this adjournment was by consent and would be
20 excluded under the detainer agreement.

21 THE COURT: Was it by consent?

22 MS. KATZ: I believe that this was the date
23 that was mutually agreeable.

24 THE COURT: When can we try this case?

25 LAW CLERK: April 26th.

1 THE COURT: You find out whether there will
2 be any speedy trial question raised here before
3 April 26th. If it is, I will bring him in.

4 MR. ROSS: If I may be heard.

5 THE COURT: It's only one day, and I have
6 these other matter pending.

7 MR. ROSS: There will be a question raised
8 under the detainer agreement.

9 THE COURT: Speedy trial because you say it
10 begins on --

11 MR. ROSS: He was returned to his original
12 place in Auburn, New York and detained there.

13 THE COURT: There is no determination in
14 this case at all. I don't know what you are talking
15 about.

16 MR. ROSS: If a defendant is returned to
17 his original place of incarceration before final
18 disposition where he's produced on detainer, the
19 indictment must be dismissed and the defendant
20 will make a motion.

21 THE COURT: You better make your motion
22 right away.

23 MR. ROSS: I have the papers today but
24 they haven't been endorsed.

25 THE COURT: If that's true, that's too bad

1 for Ms. Katz.

2 MS. KATZ: I would like an opportunity to
3 read the case law.

4 THE COURT: It looks like you're going to
5 be in trouble, Ms. Katz.

6 MS. KATZ: I don't really feel that I will,
7 your Honor.

8 THE COURT: Well, when did you want to make
9 that motion?

10 MR. ROSS: Anytime agreeable to the Court,
11 giving Ms. Katz notice. The motion is prepared.
12 The only thing is that the affidavit hasn't been
13 notarized.

14 THE COURT: We have to get all papers
15 a full week in advance. If you're going to make
16 that motion you have got to remember there's one
17 week that I'm going to be away. Could you make
18 it returnable on the 16th of April.

19 MR. ROSS: I don't see why not, Judge.

20 THE COURT: I want to know whether there
21 is any speedy trial issue before that that's
22 going to be raised. We'll try the case if we
23 have to stay at night, immediately.

24 MS. KATZ: I would then suggest, if they are
25 going to raise any speedy trial issue, I would have

1 Mr. Mauro brought down. He should be present
2 during that. I don't believe that counsel can
3 necessarily waive it on his behalf, although I imagine
4 it might be possible.

5 THE COURT: You find out whether there is
6 any speedy trial issue involved.

7 MS. KATZ: It's the Government's position that
8 there is no speedy trial issue. If Mr. Ross and
9 Mr. Mauro want to raise it then I would suggest
10 that they raise it.

11 THE COURT: They can waive it without
12 bringing him down, providing they call him up.

13 MS. KATZ: If they have discussions with
14 him and they certify that they have explained his
15 rights.

16 THE COURT: He certainly is not being
17 subjected, it seems to me, to any hardship, but
18 that's not what the rule says.

19 MR. ROSS: The real prejudice I believe,
20 that the defendant is being subject to is while
21 he's being incarcerated, that the detainer has
22 been lodged against him.

23 THE COURT: That's another matter. You make
24 a motion on that, but that doesn't have anything to
25 do with the speedy trial, does it?

1 MR. ROSS: No, Judge, but the detainer
2 agreement says a trial must be had within a certain
3 month after production.

4 THE COURT: That's the basis of your motion.

5 MR. ROSS: I don't see any question there.
6 He was produced November 12th.

7 THE COURT: And the trial was to be in four
8 months after production. You have four, five others
9 in the same category.

10 MS. KATZ: I would hesitate to comment about
11 the defendant's motion since I'm not clear exactly
12 on the basis which they are making it, but I would
13 suggest the fact that Mr. Mauro was produced and
14 at that time the trial date of March 17th was
15 set with both Mr. Mauro present and counsel; at
16 that time there was no objection to that date.
17 Specifically, Mr. Mauro to be returned to the
18 State, for whatever reason, as he did not want
19 to be held in Federal Correctional Facility, so
20 I think any objection he might have whether it be
21 legally or not, it was waived when he himself
22 was present at the March 17th setting of the date.

23 THE COURT: Maybe he can't waive it, I don't
24 know.

25 MR. ROSS: My understanding of the law is

1 that he cannot waive it.

2 THE COURT: You find out whether this delay
3 from March 17th to April 26th is going to prejudice
4 either side one way or the other. I'll make it a
5 point to have the trial before that, much sooner.

6 MS. KATZ: Can I suggest that possibly we
7 move up the date for motions because the Government
8 is somewhat handicapped. We have no idea what
9 motion Mr. Mauro through his counsel is going
10 to make.

11 MR. ROSS: It's amenable to you. I could
12 give you a copy of the motion now.

13 MS. KATZ: I have no objection to accepting
14 a copy of the motion. I would still ask that a
15 specific date be set.

16 THE COURT: I'm going away for a week,
17 Ms. Katz, and I'm not going to have you stop me
18 from having this one week vacation.

19 MS. KATZ: I certainly would not like to
20 stop you; I think you should go away.

21 THE COURT: Forever?

22 MS. KATZ: I think you are certainly
23 entitled to a vacation.

24 THE COURT: That's the only point I have.
25 What date did I say?

1 MS. KATZ: The 16th.

2 THE COURT: He is going to give you the papers,
3 and if you still feel that it ought to be shoved up
4 so that you could act, you let me know; if you don't
5 then we'll leave it April 16th.

6 How many of these things do you have?

7 MS. KATZ: One more.

8 THE COURT: One of them testified -- said he
9 would.

10 MS. KATZ: No; none of them had testified.
11 One at a time was going to testify and then refuse.

12 THE COURT: I refuse to take a year; one was
13 under the plea agreement and one was not, and he pled
14 guilty and he should be on for sentencing within a
15 couple of weeks. All right, Ms. Katz.

16 (Whereupon, Court stood in recess for the
17 day in this matter.)
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

JOHN MAURO,

Defendant.

:

:

:

:

75-CR-816

United States Courthouse
Brooklyn, New York

April 26, 1976

B e f o r e :

HONORABLE JOHN R. BARTELS, U.S.D.J.

HARRY RAPAPORT
ACTING OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: MARSHA KATZ, ESQ.
Assistant U.S. Attorney

ROBERT SADAWSKI, ESQ.
Attorney for the Defendant

1
2 THE COURT: All right, I will listen to the
3 argument.

4 MR.SADAWSKI: Your Honor, its the position of
5 the defendant on this application --

6 THE COURT: You will have to talk louder.

7 MR.SADAWSKI: It is the position of the
8 defendant on this application to dismiss the pending
9 indictment for criminal intent for two reasons:

10 One, that we have an existing agreement, the
11 Interstate agreement on detainers, and we believe that
12 agreement, which is binding on the State of New York
13 and the Federal Government, has been violated and that
14 the failure of the Government to comply with that
15 agreement is ground for and makes the indictment
16 susceptible to being dismissed.

17 The other point we raise is that at the time of
18 the actual fact occurring, the time of the refusal
19 to testify before the Grand Jury -- at which time
20 there was discussion with the bench and defense counsel
21 and the defendant -- and during that entire period of
22 time there was no mention of the jeopardy involved of
23 a criminal contempt for his behavior.

24 THE COURT: I think that that issue has been
25 decided. I believe I decided it in another case, didn't
I Miss Katz?

1 MS. KATZ: Your Honor, you decided, which I
2 believe is a related issue, motion was made in the
3 United States v. Smith to dismiss the criminal contempt
4 indictment on the ground of double jeopardy in that
5 they had been found guilty of civil contempt.
6

7 In that case and in that decision you held that
8 these were two separate and distinct proceedings, one
9 had nothing to do with the other and separate sentences
10 can be imposed.

11 I have a copy of your decision.

12 THE COURT: Yes. I am not going to change it.

13 MR. SADAWSKI: Your Honor, United States v
14 Smith is not on the same factual basis as this case.

15 THE COURT: What differentiates it?

16 MR. SADAWSKI: United States v Smith --

17 THE COURT: I have very good hearing, but you
18 don't come across. I don't know if she hears. She is
19 right next to you.

20 I hear all right, but I have to strain a little.

21 MR. SADAWSKI: I'm sorry.

22 United States v Smith, your Honor, the point
23 raised there is that it would be double jeopardy.
24 Here we feel it is not a double jeopardy item and we
25 feel that the due process of this defendant has been
violated in that he has not been fairly appraised of

1 an action that the Government intended to take and
2 that they should have advised --

3 THE COURT: I read your brief and recited the
4 Yates case.

5 MR. SADAWSKI: Yes. There are some persuasive
6 arguments there, yes.

7 THE COURT: I will deny your motion on that
8 ground.

9 However, I am considerably bothered of the fact
10 that this defendant was returned without being tried
11 as required by the Interstate agreement on detainers.

12 One thing that does stick out, however, is that
13 he asked to be returned. He didn't want to stay at
14 the Metropolitan Correctional Center. Is that right?

15 MR. SADAWSKI: Your Honor, to that end I have
16 just had a discussion with the defendant to straighten
17 out my own beliefs what happened on that date and he
18 had asked me to relate to the Court that he will
19 testify on that matter, that he did not request to go.
20 And quite to the contrary, not for any legal reasons,
21 for altruistic reasons, but for his own reasons. His
22 grandmother was sick, the holidays were approaching
23 and the visitation was ten times more liberal in the
24 Federal detention here, that he preferred to be here.
25 And the Government shipped him away. He had made

1 application to go to a hospital and a funeral subsequent
2 to that based on the sickness of his grandmother,
3 which became part of the reason he wanted to stay here
4 in the first place, I'm not saying for a legal reason
5 but it turned out because of circumstances, a quirk of
6 circumstances, that he wanted to stay here.

7 MS. KATZ: My recollection was the same as the
8 Court's. I have attempted to get a copy of the
9 transcript of those proceedings and have not been
10 successful to that end.

11 I think in terms of the issues the Interstate
12 Agreement on Detainers, I believe on Mr. Mauro's
13 counsel missed one important point. I realize there
14 is a Third Circuit case contrary to the Government's
15 position, nevertheless I believe he was not produced
16 pursuant to this agreement. And it is not an automatic
17 thing.

18 THE COURT: Your argument is that he is entitled
19 to a writ?

20 MS. KATZ: Yes. This is a significant argument,
21 I believe.

22 THE COURT: Then, of course, that would make
23 the Interstate Agreement on Detainers meaningless.

24 MS. KATZ: No, your Honor. I don't believe
25 that's the case.

1 For example, if a state wishes to get a prisoner
2 from the Federal Government they may issue a writ and
3 the Bureau of Prisons may out of accommodation honor
4 it. And the state has no power in which to enforce
5 that writ. They may say, "I'm sorry, we will not
6 turn him over."

7 THE COURT: You mean to say if the Federal
8 Government issued a writ and the state would not observe
9 that writ?

10 MS. KATZ: No, your Honor. If the State Court --

11 THE COURT: This is not a State Court proposition.
12 This is a Federal Court.

13 MS. KATZ: Yes, your Honor. But I believe that
14 was the purpose of the Interstate Agreement, to give
15 a procedure by which a state may get a prisoner from
16 the Federal Courts.

17 THE COURT: Nothing in the legislative history
18 indicates anything of that at all.

19 MS. KATZ: I think the legislative history is
20 very skimpy in this case.

21 THE COURT: It is skimpy.

22 MS. KATZ: It is unfortunate the full purpose
23 of this act was never fully discussed. But I think
24 the legislative history is not tctally void of any
25 discussion on this point.

1 The statements made by the Attorney General and
2 the Bureau of Prisons speak for the fact that there are
3 many Federal prisons for which there are State detainees
4 lodged against them. They also speak about the fact
5 that there is no way for the State to get these
6 prisoners.

7 THE COURT: You're arguing for the State. I
8 don't believe you have any -- you are a United States
9 Attorney. You may argue for the Government. You are
10 not in a position to complain because the State will
11 have to obey the writ issued by the Federal Government.

12 MS. KATZ: I admit the fact that if a Federal
13 District Court Judge orders a state officer to do an
14 act, that that officer will have to comply. Nonetheless,
15 that's not the issue before the Court.

16 The issue before the Court is the Interstate
17 position on detainees. It's the Government's position
18 that this, not by the issuing of a writ automatically
19 invoking the procedures of this act, that that was not
20 the purpose and that is not what was meant. That unlike
21 the State, the Federal Government did have a procedure
22 by which it can get the custody of the prisoner. Nons-
23 theless, it entered into it to give the State a
24 corresponding right it did not have.

25 And now to say every time we use the inherent

1 power of the Court to request the presence of an
2 individual we are automatically invoking an agreement,
3 not known at the time that the writ was signed by the
4 Court or by myself.

5 THE COURT: What do you mean by that? I wasn't
6 supposed to know? I wasn't trying the case, you're
7 trying the case?

8 MS. KATZ: I am aware, your Honor, of the fact
9 that the Government is supposed to have knowledge of
10 all statutes, acts and various criminal law involving
11 any case that it comes before. Nonetheless, it was
12 not the intention of the Government, nor I believe the
13 intention of the Court, at the time the writ was
14 executed.

15 THE COURT: It was certainly not the intention
16 of the Court to do so under the agreement and you have
17 a case in the Third Circuit facing it. This may be
18 a case where Congress may be importuned to make changes
19 of the act. But I don't know how the Court can escape
20 imposing it.

21 MS. KATZ: Judge, I don't think Congress meant
22 the result that --

23 THE COURT: You have two problems here. First
24 is the fact that you returned the prisoner. And the
25 second is that maybe if you didn't return him, have

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1 you tried him in the 120 days.

2 MS. KATZ: At the time you offered various dates
3 to the defendant.

4 THE COURT: Yes, March 17th was one.

5 MS. KATZ: Yes. And there were two earlier
6 dates and Mr. Murphy indicated the fact that he was
7 unavailable.

8 THE COURT: Maybe you can exclude the time and
9 that would bring us up to Wednesday.

10 MS. KATZ: Your Honor, I was prepared to try it
11 on the 17th of March and I am prepared to try it today
12 also.

13 MR. SADAWSKI: May I be heard briefly, your
14 Honor?

15 THE COURT: Yes.

16 MR. SADAWSKI: The method of invoking the
17 Interstate Agreement, whether by a writ or by some
18 form pursuant to the statute does not change the
19 ramifications of whence the Federal Government has
20 custody.

21 Miss Katz has raised a point not relevant here.
22 We are not so much concerned of how you got them. The
23 statute doesn't say if you use a writ ad testificandum
24 it's okay. One says on those exceptions, you have a
25 charge and indictment, he has been arraigned on the

1 indictment and you must try him before you send him
2 back. It doesn't raise the situation of how he got
3 to your custody, but --

4 THE COURT: Mrs. Katz, I understand your position
5 and I don't necessarily understand the Congressional
6 posture. They say you have interrupted the rehabilita-
7 tive procedures of Mr. John Mauro and he would have
8 been much further rehabilitated were it not for the
9 fact that you sent him back. You can see that by
10 looking at him.

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12 (Continued on next page)
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1 1 MR. SADAWSKI: We have some documentary proof
2 in that area.

3 THE COURT: I bet.

4 MR. SADAWSKI: We have denials of drug transfer
5 programs and --

6 THE COURT: Mrs. Katz, you just have to some-
7 times face up to some of the bizarre and queer
8 statutes that we are faced with. It is a sad situation
9 because I don't think they think too deeply down
10 there, but nevertheless here is the statute.

11 I have to rule that under the Interstate
12 Agreement on detainers and when the Government requests
13 the presence of a defendant for the purpose of trial,
14 the Government must, one, try the defendant within
15 120 days of his arrival in federal custody as extended
16 by the Court with the consent of the defendant; and,
17 two try him before returning him to State custody.
18 That's Article 4-C and E of the agreement.

19 And accordingly, regretfully and reluctantly
20 the indictment must be and is hereby dismissed.

21 An opinion will follow. See United States
22 ex rel Esola v. Groomes, 520 Fed. 2d 830, Third
23 Circuit, 1975 and United States v. Ricketson, 498
24 F. 2d, 367, Seventh Circuit, 1974.

25 Now, I know this will help you, Mr. Mauro.

2 1 MS. KATZ: I ask that the writ not be satis-
2 fied so I can issue a subpoena to put Mr. Mauro
3 before a Federal Grand Jury.

4 THE COURT: All right.

5 MR. SADAWSKI: Can you explain that to me,
6 your Honor?

7 THE COURT: Yes.

8 MS. KATZ: I will issue a new subpoena.

9 THE COURT: He is here right now and she wants
10 to see whether he is going to testify before a Grand
11 Jury. He will probably take the same position he
12 took before, but that's a new subpoena. So I will
13 not satisfy the writ for a day.

14 MS. KATZ: Thank you, your Honor.

15 THE COURT: You're only here for trial and
16 you got your dismissal.

17 MR. SADAWSKI: Here to prevent any further
18 injustice, your Honor.

19 THE COURT: Don't worry about that, don't worry
20 about that.

21 MR. SADAWSKI: I have a question on what writ
22 is existing now?

23 THE COURT: No writ yet. And she will serve --
24 is that right, Ms. Katz?

25 MS. KATZ: Yes. All I am simply asking is that

1 he not be sent back to whatever state facility he is
2 in so we can issue a new writ ad testificandum.

3 THE COURT: This is a matter of convenience,
4 that's all. And you can move to dismiss it.

5 We are not going to go through another unnecessary
6 mechanical problem. She can issue it any way. If you
7 send him back, I can still sign it and then you still
8 come back.

9 Now, why do that?

10 MR. SADAWSKI: The reason for my question, I
11 think the Court should be advised is that the same
12 detainer that was issued to bring him down for testimony
13 before the original Grand Jury is the same detainer
14 that they brought him down for this appearance. It
15 has never been changed, updated or court-approved
16 since July of last year.

17 Is that writ still in effect?

18 THE COURT: No. I suppose that wouldn't be.

19 MR. SADAWSKI: It is a good question.

20 MS. KATZ: I would object. I think there is
21 some misunderstanding here.

22 What happened to Mr. Mauro concerning the civil
23 contempt and whether there is a bail of detainer still
24 lodged pursuant to the Court Order in that case and the
25 production of him in that case is a separate and

1 distinct issue to anything that has to do with the
2 criminal contempt.

3 He was brought for the purposes of arraignment
4 on an indictment via a writ ad prosequendum to this
5 court, I believe, sometime in November. I don't
6 remember the exact date. That is the writ he is being
7 brought down here on. All of the other writs have to
8 do with the civil contempt and are not before this
9 proceeding.

10 Now, if counsel wants to make a motion to
11 dismiss the detainer on whatever grounds he wants,
12 as to the civil contempt, that's a separate and
13 distinct proceeding.

14 THE COURT: Yes. This is an indictment under
15 criminal contempt and the problem before the Court is
16 can he be tried under that indictment inasmuch as a
17 detainer which was lodged in the State Prison was now
18 was such that he wasn't tried within the proper time
19 and he was returned.

20 And I say that means that this indictment must
21 be dismissed. There is nothing else before the Court
22 except a dismissal of the indictment.

23 MR. SADAWSKI: Yes. But I think as a collateral
24 matter to that dismissal all other administrative
25 items which are proving detrimental to the defendant

1 should be removed.

2 THE COURT: Wait a minute, wait a minute.

3 The detainer was filed for this indictment,
4 was it?

5 MS. KATZ: No.

6 MR. SADAWSKI: No, your Honor.

7 THE COURT: Well, then nothing else is before
8 me.

9 MR. SADAWSKI: May I ask from the U.S. Attorney
10 why such a detainer still remains?

11 MS. KATZ: If Mr. Sadawski would like to make a
12 motion concerning the civil contempt and the validity
13 of the detainer still outstanding, the Government would
14 be happy to reply to that motion. And that motion has
15 not been made now or in the past. The motion was
16 made as to the criminal contempt and that's separate.

17 THE COURT: Wait a minute.

18 You have too many lawyers. If you want to
19 argue it, you may come up. And I am not trying to
20 be rude, but it does interfere with the orderly
21 procedure to have you arguing it while I am listening
22 to Mrs. Katz. You can see that. If you want to take
23 a little five-minute recess to talk to him, that's
24 perfectly all right.

25 But let me tell you my reaction, Mrs. Katz.

1 The civil contempt I thought was more or less satis-
2 fied. Wasn't that over with? I mean, Judge Costantino
3 put him in jail stating he had satisfy the contempt
4 if he testified, right? And he never testified, is
5 that right?

6 MS. KATZ: Yes.

7 THE COURT: Isn't that all over with now?

8 MR. SADAWSKI: The query, is that Grand Jury
9 still alive?

10 MS. KATZ: The Grand Jury is still alive.

11 THE COURT: The Grand Jury is still alive. And
12 you want to try him again because the Grand Jury is
13 still alive, you want to subpoena him and see if he
14 wants to refuse to testify again, right?

15 MS. KATZ: Your Honor, the Government -- you
16 have dismissed the indictment.

17 THE COURT: I can see what you're thinking about,
18 Mrs. Katz.

19 MS. KATZ: I believe I have the perfect right
20 to issue a new subpoena.

21 THE COURT: Correct.

22 MS. KATZ: And to issue a new writ to hold him
23 down for the purposes of appearing before the Grand
24 Jury.

25 THE COURT: And he will say this matter has been

1 decided once. It's res judicata and it's not before
2 me now and she has a right to do it.

3 MR. SADAWSKI: She asked for a matter of con-
4 venience for the Court to hold the defendant here.
5 And I asked if we are going to be convenient, we may
6 as well wipe out a writ --

7 THE COURT: She has a right to present her case
8 and if there is nothing to it, it will be dismissed.
9 And she has a right to subpoena him, she says. And
10 I suggested you are going through the same thing again,
11 Mrs. Katz. And if you do, you will get the same
12 answers and I can't sit here now knowing what Mrs. Katz
13 has in her mind.

14 I think he ought to stay here as a matter of
15 convenience to serve it on him and she will do it any
16 way. And you gain nothing by sending him back and
17 wasting the Government's money.

18 Is that what you were talking about, Mrs. Katz?

19 MS. KATZ: Yes, your Honor. All I wanted to
20 do is have an opportunity to serve a subpoena and put
21 him before a Grand Jury.

22 THE COURT: All right, you will. Granted.

23 Next case.

24 I will file a little more elaborate opinion.
25 It won't be much more.

1 MS. KATZ: Thank you, your Honor.

2 THE COURT: They do worst things than that in
3 Washington.

4 * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

JOHN FUSCO,

Defendant.

75 CR 819

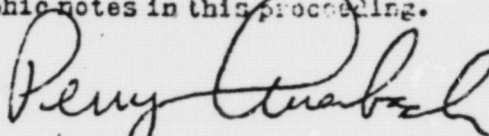
United States Courthouse
Brooklyn, New York

April 29, 1976
10:00 a.m.

B e f o r e :

HONORABLE JOHN R. BARTELS, U.S.D.J.

I hereby certify that the foregoing is
a true and accurate transcript from my
stenographic notes in this proceeding.



Official Court Reporter
U. S. District Court

PERRY AUERBACH
ACTING OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: MARSHA KATZ, ESQ.
Assistant United States Attorney

JOHN CORBETT, ESQ.
Attorney for Defendant

- - -

(Discussion off the record.)

MISS KATZ: We are discussing the motion made by John Mauro through his attorney concerning interstate agreement on detainers act. Mr. Fusco was brought out of -- I believe it is Clinton State Prison on November 5, 1975, for the purposes of arraignment. He was returned to that prison on December 18, 1975, and then he was, pursuant to a writ of ad prosequendum brought to this court. He left Clinton on April 28, 1976, and is at present in the courtroom today.

THE COURT: Wait a minute. He was sent back on December 17th, right?

MISS KATZ: 18th, your Honor.

THE COURT: Then he was brought down here?

MISS KATZ: April 28, 1976.

THE COURT: Yes. You see, there are two phases of the statute that are involved. I think to bring him down on November 5th, you can't return him according to my interpretation of the statute without trying him.

MISS KATZ: Your Honor, as to the question of the 120 days, at the time Mr. Fusco was in the courtroom, I believe that the original trial date for this was February 4th.

1 MR. CORBET.: That is right.

2 MISS KATZ: The Government at the time stated
3 that they were ready to try the case at the time of
4 the arraignment. Your Honor set it down for
5 February 4th. Quite honestly, it was adjourned, I
6 believe, by your Honor to this date.

7 MR. CORBETT: That is right.

8 THE COURT: After -- didn't I ask them if they
9 waived speedy trial?

10 MISS KATZ: Your Honor, I am sorry. I don't
11 have any notation about that.

12 MR. CORBETT: I have no notation of that. My
13 notation was this was on December 2nd. We appeared
14 before your Honor and a trial date was set for February
15 4th.

16 THE COURT: However, he was sent back.

17 MR. CORBETT: He was sent back to Clinton
18 Prison at Dannemora at that time.

19 THE COURT: Well --

20 MISS KATZ: I don't believe there is any issue
21 on the 120 days. It is true that he was sent back
22 prior to the completion of all the criminal proceedings
23 in this case.

24 THE COURT: Well, I have to know the exact time
25 of the writ. I guess the files will show that on

1 November 5 he was really down here.

2 MISS KATZ: Yes, your Honor. I believe it is
3 the same writ that was used for Mr. Mauro. It is a
4 writ of ad prosequendum.

5 Now, he was brought forth on other dates, but
6 that was pursuant to the civil contempt, and his
7 testimony before the Grand Jury, which has nothing to
8 do with this case.

9 THE COURT: And he was returned on December the
10 18th.

11 MISS KATZ: Yes.

12 THE COURT: Without being tried.

13 MISS KATZ: Yes, your Honor.

14 THE COURT: And the case was set down for
15 April 28th.

16 MISS KATZ: Your Honor, originally it was set
17 down for February 4th.

18 THE COURT: Well, in February 4th, that was just
19 about 90 days, approximately; wasn't it?

20 MISS KATZ: I believe it is approximately that.

21 THE COURT: February 4th, assuming he wasn't
22 returned, I mean you still have to try within 120 days.

23 MISS KATZ: Your Honor, I believe that the
24 delay was because of your own calendar and your own
25 schedule.

1 THE COURT: It was delayed because on
2 February the 4th I went into the hospital.

3 MISS KATZ: Yes, your Honor. I don't believe
4 that is a delay that can be attributed to the Govern-
5 ment. We were certainly ready to proceed immediately
6 and try the case on February 4th.

7 THE COURT: I went to the hospital that day or
8 February 3rd, and then it was put down for April.

9 MR. COR: Yes, sir. For today.

10 THE COURT: So, as far as the 120 days is
11 concerned, this case differs from the case of Mauro;
12 doesn't it?

13 MISS KATZ: Well, your Honor, it is our position
14 that in Mauro, he consented to the trial date because
15 of commitments.

16 THE COURT: He denied that, as you know, right
17 in your presence.

18 MISS KATZ: I think it was denied, his consent
19 to be returned to the prison. I don't think he denied
20 to be returned on that date. I think he consented.

21 THE COURT: That is within 120 days.

22 MISS KATZ: Your Honor, I am not really sure.
23 But he was offered two alternative days, and this was
24 the choice made by him and his attorney. He was
25 offered both the 4th and the 9th, which he rejected.

1 So, I believe that that was not a delay attributable
2 to the Government, and that we were prepared to try
3 him within the 120 days.

4 THE COURT: I think that --

5 THE CLERK: I believe you offered him either
6 February 4th or 8th.

7 THE COURT: Who is "he"?

8 THE CLERK: The attorney for Mr. Mauro.

9 THE COURT: It was the attorney for Mr. Mauro.

10 MISS KATZ: But Mr. Mauro was present in the
11 courtroom and consulted with him.

12 THE COURT: Yes. Now he is bound by that.

13 MISS KATZ: I don't believe that the delay is
14 attributable to the Government.

15 THE COURT: And you say that in this case that
16 the delay is not attributable to the Government?

17 MISS KATZ: No, your Honor. You pointed out that
18 you were hospitalized. It certainly can't be attributable
19 to the Government.

20 THE COURT: Anyway, you returned him.

21 MISS KATZ: Yes. The facts are he was produced
22 on November 5, 1975, for the purposes of arraignment,
23 and he was returned prior to trial.

24 THE COURT: Yes. Well, there wasn't any trial.
25 He returned December 18th. Now, I assume you move for

1 a dismissal in the Interstate Detainer Act; is that
2 right?

3 MR. CORBETT: I so move.

4 THE COURT: I don't know why this case is any
5 different from Mauro.

6 MISS KATZ: Your Honor, I did not say there was
7 any difference.

8 THE COURT: So I have no alternative; do I?

9 MISS KATZ: Well, your Honor, you have. If
10 your Honor would like me to reargue the issues of law
11 that I did in the case of the United States vs. Maur ,
12 I would be happy to do so.

13 THE COURT: All you have to do is give me the
14 same brief.

15 MISS KATZ: Yes. The factual pattern is similar
16 to Mr. Mauro's situation. I would resubmit my memorandum
17 of law in this case, as I did in Mr. Mauro's case,
18 and make the same oral argument, some of which was
19 made in the Third Circuit case and was rejected. One
20 of these was, it was not a real detainer, it was a
21 writ, and that is the reason it did not fall in the
22 Detainer Act.

23 The second fact is the Act requires in Part 3,
24 a formal acknowledgement of invoking rights under the
25 Interstate Agreement Act. I would argue that in Part 4,

1 it also requires a formal act of-actually stated that
2 we were invoking our rights under the Interstate Act.

3 THE COURT: What you say, that unless the
4 defendant at the time --

5 MISS KATZ: Your Honor, in Part 3, the defendant
6 must specifically invoke the act, and I would argue that
7 in order to bring Part 4 into play, the Government must
8 specifically invoke the Act, which was not done in
9 this case.

10 THE COURT: You mean in order to bring in Part 4,
11 the Government must demand a trial, that he didn't do
12 it?

13 MISS KATZ: Your Honor, in order to bring in
14 Part 4, we must demand that his production under Part
15 4 of the Interstate Agreement Act, which wasn't done.

16 THE COURT: Neither made any demand.

17 MISS KATZ: Yes, your Honor, but I believe in
18 Part 3, in order for a defendant to invoke his right
19 into Part 3, you must specifically invoke the Act by
20 so stating in writing that he is moving for a completion
21 of a detainer or matters concerning a detainer under
22 the Interstate Agreement Act, Part 3.

23 I would suggest to this Court that the Government
24 must do the same thing that in order to have an
25 individual produced pursuant to the Interstate Agreement

1 Act, we must state in writing that we demand the
2 prisoner pursuant to Part 4 of the Interstate Agree-
3 ment Act, and if we do not do so, then we are not
4 bound by the other provisions of the Act.

5 THE COURT: Because you circumvent the other
6 Act completely; wouldn't you? All you have to do, you
7 pay no attention to a detainer.

8 MISS KATZ: I believe the Government need not
9 invoke the Act. That is not, no. Say that other
10 jurisdictions might not need the --

11 THE COURT: You made that argument.

12 MISS KATZ: Yes, your Honor. I believe I have.

13 THE COURT: Then you also say that if the
14 defendant wants to take advantage of it, he has to.

15 MISS KATZ: Right.

16 THE COURT: Right.

17 MISS KATZ: Yes, your Honor.

18 THE COURT: He has to do it in writing.

19 MISS KATZ: Yes, sir. And I also suggest that
20 a defendant can waive his rights by requesting that
21 he be returned to -- whether it be the State Prison
22 or from a State or a Federal Prison, from whence he
23 came.

24 THE COURT: You never had that here.

25 MISS KATZ: Well, your Honor, until we get a

1 copy of the proceedings, we don't know exactly who
2 agreed and who did not agree to be returned.

3 THE COURT: I don't think you have that in the
4 proceedings. He was returned. I don't think he put
5 down on the record one way or the other whether he
6 was requesting it or you were.

7 MISS KATZ: Your Honor, I believe Mr. Fusco did
8 request to be returned to Clinton. That he did not
9 want to stay here. But, this is my recollection.

10 MR. CORBETT: I don't recall that being on the
11 record.

12 THE COURT: Well, you better find out, Miss Katz.
13 You find out.

14 MISS KATZ: Your Honor, Mr. Corbett was in the
15 courtroom. Do you recall it being on the record or
16 not, that Mr. Fusco requested that he be returned?

17 MR. CORBETT: I know he spoke to me, not in the
18 courtroom, and said he was unhappy with the MCC, and
19 would like to go to Dannemora, but he never stated
20 on the record, as I recall, Miss Katz.

21 MISS KATZ: Your Honor, he did make a represen-
22 tation, whether it was on the record or not.

23 THE COURT: Of course, when you waive a right,
24 you must do so knowing as to what you are waiving.
25 And I assume, Mr. Corbett, that you didn't tell him

1 that he had a right to be tried here?

2 MR. CORBETT: No, I did not.

3 THE COURT: (Continuing) In 120 days, and that
4 if he didn't request or waive that right, the Govern-
5 ment could not return him without a trial, and if
6 the Government did return him, under the circumstances,
7 they could no longer try him.

8 MR. CORBETT: Yes, sir.

9 THE COURT: Fortunately, Miss Katz, the defense
10 here is one that is not too serious. But, you could
11 have a hijacking case or a bank robbery, and then to
12 let the fellow off --

13 MISS KATZ: Well, your Honor --

14 THE COURT: You see, that would be terrible;
15 wouldn't it?

16 MISS KATZ: I would suggest that there are
17 probably many cases in this jurisdiction, as well as
18 other jurisdictions, where this procedure has been
19 followed. It is not an unusual procedure for an
20 individual to be produced for the purposes of an arraign-
21 ment and then returned until such time as trial.
22 So, I -- although, and I certainly am not sure I agree
23 with you that this is not a serious offense. I believe
24 this is not. It is unlucky that this is the only case
25 where the fact will be involved in.

1 (Whereupon, a discussion was held off the
2 record.)

3 THE COURT: Maybe you might ask him if he wants
4 to answer those questions.

5 (Whereupon, a discussion was held off the
6 record.)

7 THE COURT: All right. Mr. Fusco, you are going
8 to be very lucky. Due to a statute that was passed
9 in 1970, the Government could not return you after
10 your original place of incarceration, without auto-
11 matically requiring the Court to dismiss the indictment
12 against you. The Government did return you on
13 December 18th and automatically I have to dismiss the
14 indictment. So, I am dismissing the indictment.

15 MR. FUSCO: Your Honor, may I say something?

16 THE COURT: Yes.

17 MR. FUSCO: You stated that you felt I was lucky.
18 Well, I was just at a parole hearing and I was given
19 the maximum I could get at the parole hearing, due
20 to the circumstances that I had an unfavorable report
21 from the DA's office. Now, I really feel that because
22 of all of this that I went through was due to this
23 unfavorable report, because he is in total contrast
24 with what he had stated at my sentencing.

25 MR. CORBETT: This was the District Attorney in

14

1 Queens County. A 118

2 MR. FUSCO: But now the penalty has already
3 been served twice to me; civil contempt by a parole
4 board, and I lost my job. Then I was denied programs.
5 I have been far from lucky on all these circumstances.
6 I am serving a life sentence, your Honor.

7 THE COURT: You brought in a lot of cocaine.

8 MR. FUSCO: I know, sir. I was charged with an
9 attempted possession. An attempt.

10 THE COURT: Did you have a record?

11 MR. FUSCO: No, sir. I was never incarcerated
12 in my life. Three years in the Service. I am married.
13 I worked till the day I was incarcerated.

14 THE COURT: It was the District Attorney in
15 Queens' report?

16 MR. FUSCO: Yes, sir. I feel this had plenty
17 to do with it.

18 THE COURT: Wait a minute. Wait a minute. Don't
19 talk so fast without knowing what you are talking
20 about. I am asking you to listen for a minute.

21 Miss Katz, you don't have to do with any report?

22 MISS KATZ: Your Honor, I believe that a noti-
23 fication was made to the District Attorney's Office
24 concerning the fact that he was put before the Grand
25 Jury and granted immunity and he refused to testify.

1 I don't think there is little question about the
2 factual situation, and the dismissal in this situation
3 has nothing to do with that situation.

4 THE COURT: None whatsoever. You are lucky;
5 still lucky, because if you were tried, you refused
6 to answer, and if this indictment stood up and you
7 were found guilty, I was going to add to your sentence.
8 Now, keep that in mind and see how lucky you are.
9 You can't come here and thumb your nose at justice
10 and do the things you have done and then tell everyone
11 how unlucky you are. You are lucky because the
12 indictment was dismissed.

13 (Time noted: 10:45 a.m.)

14 * * *

UNITED STATES OF AMERICA

-vs-

JOHN MAURO

PETITION FOR A WRIT OF
HABEAS CORPUS AD PROSEQUENDUM

75 CR 816

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK:

The petition of Marsha Katz Special Attorney for the Eastern
District of New York, respectfully shows to this Court that John Mauro
now being detained in Auburn Correctional Facility, Auburn, N.Y.
is charged, by an indictment filed against him in the Eastern District of New York,
with violation of Title 18 United States Code, Section(x) 401

It is necessary that the said defendant John Mauro be brought
to the United States District Court for the Eastern District of New York for trial
before said United States District Court for the Eastern District of New York on
the charges now pending against him.

WHEREFORE, your petitioner prays that a Writ of Habeas Corpus ad Prosequendum
issue in this behalf directing that the said John Mauro be produced
at the time and place set forth in said Writ, in civilian clothes, and that, after
the said John Mauro shall have appeared in pursuance of said
Writ, and at the termination of the proceedings in the said United States District
Court for the Eastern District of New York on that particular day, he be returned
immediately to the custody of the Warden, Auburn Correctional Facility,
Auburn, N.Y.
under safe and secure conduct.

Dated: Brooklyn, NY
November 5, 1975

Marsha Katz
SPECIAL ATTORNEY

EASTERN DISTRICT OF NEW YORK, SS:

MARSHA KATZ being duly sworn, says that he is the petitioner above
named; that he had read the foregoing petition by him subscribed and knows the
contents thereof; that the same are true of his own knowledge and belief.

Marsha Katz
SPECIAL ATTORNEY

Sworn to before me this 5th
day of November, 1975

Richard P. Shanley

NOTARY PUBLIC
STATE OF N.Y. 30-3610090
JAMES MASSAU
FORM 3-30 77

THE PRESIDENT OF THE UNITED STATES OF AMERICA


TO THE WARDEN, Auburn Correctional Facility, Auburn, New York
AND/OR TO THE UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF NEW YORK, AND/OR TO ANY OF HIS DEPUTIES, AND/OR TO ANY UNITED STATES MARSHAL

GREETINGS:

YOU ARE HEREBY COMMANDED to have the body of John Mauro
now detained under your custody, as it is said, under safe and secure conduct,
in civilian clothes, before the United States District Court for the Eastern District
of New York, at the United States Courthouse, in such courtroom as shall be designated,
in the Borough of Brooklyn, City, State and Eastern District of New York, on the 19th
day of November at 10 o'clock in the fore noon of that day, for
trial before said United States District Court for the Eastern District of New
York upon an indictment filed in said Eastern District of New York against the
said John Mauro charging him with violation of Title 18
United States Code, Section(g) 401 and, at the termination of the proceedings
in the said United States District Court on that particular day, that you return
him forthwith to the Warden, Auburn Correctional Facility, Auburn, N.Y.
under safe and secure conduct.

LET THE ABOVE WRIT ISSUE.

Dated: Brooklyn, NY
November 5, 1975


UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF NEW YORK

Clerk USDC EDNY

By: _____
Deputy Clerk

UNITED STATES OF AMERICA

-vs-

JOHN MAURO

PETITION FOR A WRIT OF
HABEAS CORPUS AD PROSEQUENDUM

No. 75 CR 816

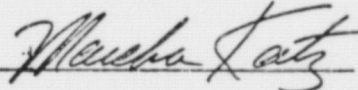
TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK:

The petition of Marsha Katz Special Attorney for the Eastern
District of New York, respectfully shows to this Court that John Mauro
#6689
now being detained in Auburn Correctional Facility, Auburn, N.Y.
is charged, by an indictment filed against him in the Eastern District of New York,
with violation of Title 18 United States Code, Section(8) 401

It is necessary that the said defendant John Mauro #6689 be brought
to the United States District Court for the Eastern District of New York for trial
before said United States District Court for the Eastern District of New York on
the charges now pending against him.

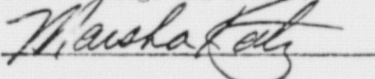
WHEREFORE, your petitioner prays that a Writ of Habeas Corpus ad Prosequendum
issue in this behalf directing that the said John Mauro #6689 be produced
at the time and place set forth in said Writ, in civilian clothes, and that, after
the said John Mauro #6689 shall have appeared in pursuance of said
Writ, and at the termination of the proceedings in the said United States District
Court for the Eastern District of New York on that particular day, he be returned
immediately to the custody of the Warden, Auburn Correctional Facility, Auburn, N.Y.
under safe and secure conduct.

Dated: Brooklyn, NY
April 14, 1976

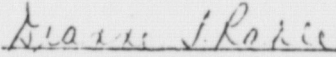

SPECIAL ATTORNEY

EASTERN DISTRICT OF NEW YORK, SS:

Marsha Katz being duly sworn, says that he is the petitioner above
named; that he had read the foregoing petition by him subscribed and knows the
contents thereof; that the same are true of his own knowledge and belief.


SPECIAL ATTORNEY

Sworn to before me this 14th
day of April, 1976



77

THE PRESIDENT OF THE UNITED STATES OF AMERICA

TO THE WARDEN, AUBURN CORRECTIONAL FACILITY, AUBURN, NEW YORK, AND/OR TO THE UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF NEW YORK, AND/OR TO ANY OF HIS DEPUTIES, AND/OR TO ANY UNITED STATES MARSHAL

GREETINGS:

YOU ARE HEREBY COMMANDED to have the body of JOHN MAURO #6689 now detained under your custody, as it is said, under safe and secure conduct, in civilian clothes, before the United States District Court for the Eastern District of New York, at the United States Courthouse, in such courtroom as shall be designated, in the Borough of Brooklyn, City, State and Eastern District of New York, on the 23rd day of April, 1976 at 10 o'clock in the fore noon of that day, for trial before said United States District Court for the Eastern District of New York upon an indictment filed in said Eastern District of New York against the said John Mauro #6689 charging him with violation of Title 18 United States Code, Section(x) 401 and, at the termination of the proceedings in the said United States District Court on that particular day, that you return him forthwith to the Warden, AUBURN CORRECTIONAL FACILITY, AUBURN, NEW YORK under safe and secure conduct.

LET THE ABOVE WRIT ISSUE.

Dated: Brooklyn, NY
April 14, 1976

UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF NEW YORK

Clerk USDC EDNY

By: Deputy Clerk

UNITED STATES OF AMERICA

-vs-

JOHN FUSCO

PETITION FOR A WRIT OF
HABEAS CORPUS AD PROSEQUENDUM

No. 75 CR 819

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK:

The petition of **MARSHA KATZ** Special Attorney for the Eastern
District of New York, respectfully shows to this Court that John Fusco
now being detained in Clinton Correctional Facility, Dannemora, N.Y.
is charged, by an indictment filed against him in the Eastern District of New York,
with violation of Title 18 United States Code, Section(*) 401

It is necessary that the said defendant John Fusco be brought
to the United States District Court for the Eastern District of New York for trial
before said United States District Court for the Eastern District of New York on
the charges now pending against him.

WHEREFORE, your petitioner prays that a Writ of Habeas Corpus ad Prosequendum
issue in this behalf directing that the said John Fusco be produced
at the time and place set forth in said Writ, in civilian clothes, and that, after
the said John Fusco shall have appeared in pursuance of said
Writ, and at the termination of the proceedings in the said United States District
Court for the Eastern District of New York on that particular day, he be returned
immediately to the custody of the Warden, Clinton Correctional Facility,
Dannemora, N.Y.
under safe and secure conduct.

Dated: Brooklyn, NY
November 5, 1975

Marsha Katz
SPECIAL ATTORNEY

EASTERN DISTRICT OF NEW YORK, SS:

MARSHA KATZ being duly sworn, says that he is the petitioner above
named; that he had read the foregoing petition by him subscribed and knows the
contents thereof; that the same are true of his own knowledge and belief.

Marsha Katz
SPECIAL ATTORNEY

Sworn to before me this 5th
day of November, 1975

Richard E. Shuman

NOTARY PUBLIC
STATE OF N.Y. 30-3610090
QUALIFIED NASSAU
TERM EXPIRES 3-30 77

THE PRESIDENT OF THE UNITED STATES OF AMERICA

TO THE WARDEN, CLINTON CORRECTIONAL FACILITY, DANNEMORA, N.Y.

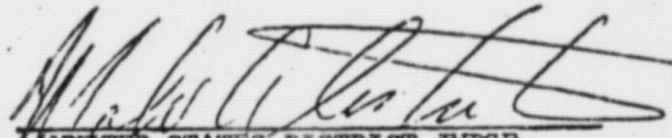
AND/OR TO THE UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF NEW YORK, AND/OR TO ANY OF HIS DEPUTIES, AND/OR TO ANY UNITED STATES MARSHAL

GREETINGS:

YOU ARE HEREBY COMMANDED to have the body of John Fusco now detained under your custody, as it is said, under safe and secure conduct, in civilian clothes, before the United States District Court for the Eastern District of New York, at the United States Courthouse, in such courtroom as shall be designated, in the Borough of Brooklyn, City, State and Eastern District of New York, on the 19th day of November, 1975 at 10 o'clock in the fore noon of that day, for trial before said United States District Court for the Eastern District of New York upon an indictment filed in said Eastern District of New York against the said John Fusco charging him with violation of Title 18 United States Code, Section (a) 401 and, at the termination of the proceedings in the said United States District Court on that particular day, that you return him forthwith to the Warden, Clinton Correctional Facility, Dannemora, N.Y. under safe and secure conduct.

LET THE ABOVE WRIT ISSUE.

Dated: Brooklyn, NY
November 5, 1975


UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF NEW YORK

Clerk USDC EDNY

By: Deputy Clerk

-----X
UNITED STATES OF AMERICA

-VS-

JOHN FUSCO

PETITION FOR A WRIT OF
HABEAS CORPUS AD PROSEQUENDUM

No. 75 CR 819

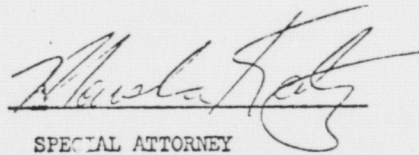
-----X
TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK:

The petition of Marsha Katz Special Attorney for the Eastern
District of New York, respectfully shows to this Court that John Fusco
now being detained in Clinton Correctional Facility
is charged, by an indictment filed against him in the Eastern District of New York,
with violation of Title 18 United States Code, Section(x) 401

It is necessary that the said defendant John Fusco be brought
to the United States District Court for the Eastern District of New York for trial
before said United States District Court for the Eastern District of New York on
the charges now pending against him.

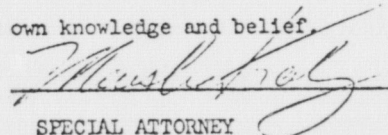
WHEREFORE, your petitioner prays that a Writ of Habeas Corpus ad Prosequendum
issue in this behalf directing that the said John Fusco be produced
at the time and place set forth in said Writ, in civilian clothes, and that, after
the said John Fusco shall have appeared in pursuance of said
Writ, and at the termination of the proceedings in the said United States District
Court for the Eastern District of New York on that particular day, he be returned
immediately to the custody of the Warden, Clinton Correctional Facility
under safe and secure conduct.

Dated: Brooklyn, NY
March 1, 1976

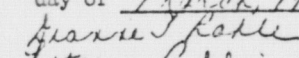

SPECIAL ATTORNEY

EASTERN DISTRICT OF NEW YORK, SS:

Marsha Katz being duly sworn, says that he is the petitioner above
named; that he had read the foregoing petition by him subscribed and knows the
contents thereof; that the same are true of his own knowledge and belief.


SPECIAL ATTORNEY

Sworn to before me this 1st
day of March 1976


Notary Public State of NY. No. 41-461 7917
Qualified in Queens County, Expires 3-30-77

THE PRESIDENT OF THE UNITED STATES OF AMERICA

A 127

TO THE WARDEN, CLINTON CORRECTIONAL FACILITY

AND/OR TO THE UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF NEW YORK, AND/OR TO ANY OF HIS DEPUTIES, AND/OR TO ANY UNITED STATES MARSHAL

GREETINGS:

YOU ARE HEREBY COMMANDED to have the body of John Fusco now detained under your custody, as it is said, under safe and secure conduct, in civilian clothes, before the United States District Court for the Eastern District of New York, at the United States Courthouse, in such courtroom as shall be designated, in the Borough of Brooklyn, City, State and Eastern District of New York, on the 18th day of March at 10 o'clock in the fore noon of that day, for trial before said United States District Court for the Eastern District of New York upon an indictment filed in said Eastern District of New York against the said John Fusco charging him with violation of Title 18 United States Code, Section(§) 401 and, at the termination of the proceedings in the said United States District Court on that particular day, that you return him forthwith to the Warden, CLINTON CORRECTIONAL FACILITY under safe and secure conduct.

LET THE ABOVE WRIT ISSUE.

Dated: Brooklyn, NY
March 1, 1976

UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF NEW YORK

Clerk USDC EDNY

By: Deputy Clerk

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

LYDIA FERNANDEZ _____, being duly sworn, says that on the 26th
day of July, 1976 _____, I deposited in Mail Chute Drop for mailing in the
U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and
State of New York, 2 two copies of Government's Appendix _____
of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper
directed to the person hereinafter named, at the place and address stated below:

John C. Corbett, Esq.
66 Court St.
Brooklyn, N. Y. 11201

Robert Sadowski, Esq.
125-10 Queens Blvd.
Queens, N. Y.

Sworn to before me this
26th day of July, 1976

Carolyn N. Johnson
Carolyn N. Johnson

Lydia Fernandez
LYDIA FERNANDEZ